

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ASTERIA EDUCATION, INC,)	CASE NO: 20-05024-CAG
)	ADVERSARY
Plaintiff,)	
)	San Antonio, Texas
vs.)	
)	Thursday, April 30, 2020
JOVITA CARRANZA, IN HER CAPACITY)	
AS ADMINISTRATOR FOR THE SMALL)	9:33 a.m. to 11:00 a.m.
BUSINESS ADMINISTRATION,)	11:05 a.m. to 11:58 a.m.
)	
Defendant.)	

LEAD CASE: 20-50169-CAG
ASTERIA EDUCATION, INC

HEARING RE:

APPLICATION FOR TEMPORARY RESTRAINING ORDER [NO.5];

ORDER FOR JOVITA CARRANZA OR AUTHORIZED REPRESENTATIVE
WITH THE UNITED STATES SMALL BUSINESS ADMINISTRATION TO APPEAR
AND SHOW CAUSE (WHY ASTERIA'S APPLICATION FOR TRO
SHOULD NOT BE GRANTED) [NO.11]

BEFORE THE HONORABLE CRAIG A. GARGOTTA,
UNITED STATES BANKRUPTCY JUDGE

DISCLAIMER: SEE CERTIFICATION PAGE

APPEARANCES: See page 2

Clerk: Maria Esquivel

Court Reporter: Recorded; FTR

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APPEARANCES FOR:

Plaintiff: EDWIN P. KEIFFER, ESQ.
Rochelle McCullough, LLP
325 N. Saint Paul St., Suite 4500
Dallas, TX 75201

Defendant: DOMINIQUE V. SINESI, ESQ.
United States Department of Justice
1100 L Street NW, Room 7020
Washington, DC 20005

Cadence Bank: MICHAEL COLVARD, ESQ.

Mammen Investments: DAVID GRAGG, ESQ.
Langley & Banack
745 E. Mulberry, Suite 900
San Antonio, TX 78212

K&L Gates: DAVID WEITMAN, ESQ.

San Antonio, Texas; Thursday, April 30, 2020; 9:33 a.m.

(Attorneys appear telephonically)

Call to Order

THE COURT: This is by telephonic hearing, Adversary Number 20-05024, *Asteria Education, Inc. versus --* and I should know how to pronounce this, but I'm probably going to mispronounce it, and I apologize, *Jovita Carranza, in her Capacity as Administrator of the SBA.*

There are two matters on the Court's Docket this morning, Number 5, ECF Number 5, the Application for TRO filed by the Plaintiff.

And then ECF Number 11, the Order for Ms. Carranza as Authorized Representative of the United States Small Business Administration to appear and show cause.

As an initial matter would Plaintiff's counsel identify themselves and state your name for the record?

MR. KEIFFER: Good morning, your Honor, Paul Keiffer for the Debtor.

THE COURT: Thank you. And for the Defendant?

MS. SINESI: Good morning, your Honor. This is Dominique Sinesi, I'm an attorney with the Department of Justice representing the SBA on this matter.

THE COURT: Could you spell your name for the record, please?

MS. SINESI: Yes, your Honor, the last name is

1 Sinesi, S as in Sam, I-N-E-S as in Sam, I; first name
2 Dominique, D-O-M-I-N-I-Q-U-E.

3 **THE COURT:** Thank you. Is there any other parties
4 appearing on the phone?

5 **MR. COLVARD:** Your Honor, this is Michael Colvard
6 (phonetic), I'm the Chair for Cadence Bank.

7 **THE COURT:** And you're just listening in,
8 Mr. Colvard?

9 **MR. COLVARD:** Yes, your Honor, principally listening
10 in, although I understand from Mr. Keiffer that the scope of
11 the TRO may have some impact on financial institutions.

12 **THE COURT:** Thank you. Anyone else?

13 **MR. GRAGG:** Yes, your Honor, Judge David Gragg here
14 for creditor and landlord Mammen Investments. I intend to just
15 listen in, Judge.

16 **THE COURT:** That's fine, sir.

17 Anyone else --

18 Oh, Mr. Gragg, could you spell the name of your
19 client, please?

20 **MR. GRAGG:** MAMN -- I'm sorry, M-A-M-M-E-N
21 Investments.

22 **THE COURT:** Thank you. Any other parties on the
23 phone?

24 **MR. WEITMAN:** Yes, good morning, your Honor, David
25 Weitman, K&L Gates. I do not have a client per se, but this is

1 of interest to many of our clients. Thank you.

2 **THE COURT:** All right, thank you.

3 Any other parties?

4 **(No audible response)**

5 **THE COURT:** All right, thank you. Before we get
6 started let's kind of set the stake, Mr. Keiffer, if I could.

7 Is it Ms. Sinesi, am I pronouncing your name
8 correctly, ma'am?

9 **MS. SINESI:** Sorry for the brief pause, I kind of
10 take it on and off mute, the name is pronounced Sinessi s/l.

11 **THE COURT:** Sinesi.

12 **MS. SINESI:** But I respond to most versions of it.

13 **THE COURT:** No, we want to get it right, so for
14 purposes of the record I have had an opportunity to read your
15 brief, Ms. Sinesi.

16 Mr. Keiffer, obviously I have had a chance to
17 consider the original application that was filed, the Amended
18 Application that was filed, the Supplement.

19 I was aware -- and let me commend you, you have been
20 very transparent in this process, Mr. Keiffer, in advising the
21 Court as best you can about the status of these matters that
22 are cropping up both in Bankruptcy and District Court. I want
23 to compliment you for your notification on the Adversary cover
24 sheet about the matter pending in Arizona before Judge Collins,
25 and then the matter pending in the, I think it's the Western

1 District of New York, I can't recall the District Court Judge's
2 name in that case, it escapes me right now, and we have looked
3 into that.

4 I also was aware, and my law clerk was in close
5 contact with Judge Jones' law clerk on the matter pending in
6 the Southern District of Texas, so we're aware of those
7 proceedings and have followed them and have tried to glean what
8 those courts have done in terms of having an understanding of
9 what the relative positions of the parties are.

10 So let me save you-all a little bit of time. I say
11 this somewhat in a joking manner, but I couldn't be more
12 serious, I just want you to understand, Mr. Keiffer, that this
13 isn't the Ninth Circuit, this is the Fifth Circuit, I am not
14 going to issue any type of national broad sweeping TRO to the
15 extent I grant one.

16 As Judge Jones noted in his case, in the Hidalgo
17 Ambulance case, I would have said the same exact thing he did,
18 even if he hadn't said it and this is the first time you're
19 hearing it, the relief that you're going to receive today, to
20 the extent you receive relief, is going to be tailored to your
21 client. I'm not going to issue some sort of national
22 injunction or a requirement that the loan application process
23 be changed because I don't think it's warranted in this
24 circumstance, and as I indicated I carefully read the brief of
25 the SBA and I agree with their arguments that it should be

1 narrowly tailored.

2 I will highlight for you, to the extent that you are
3 granted relief you're going to have to explain to me why and
4 how I can require the SBA to allocate \$700,000 and set it aside
5 for your client; and, second, you have asked the Court to put
6 your client back into the queue as all of the parties recognize
7 the first tranche of money is gone, so we're now in the second
8 tranche of money and we're all acutely aware, based upon
9 reports that we receive daily, that that money is being
10 allocated for businesses as they apply. So certainly I'll
11 entertain argument on that, but you're going to have to explain
12 to me how I'm going to do that to, Number 1, order the SBA to
13 set aside \$700,000; and second, how I'm supposed to put your
14 client, to the extent I grant the relief requested, back in the
15 queue.

16 The other thing I'll just share with you-all just as
17 an initial matter, while I don't claim to be an administrative
18 law expert, these issues are not foreign to me. When I was an
19 Assistant United States Attorney I litigated some of these
20 cases, so let's just say I have a working knowledge of it. I
21 don't assert that I have any claim of expertise, but the
22 concepts aren't foreign to me in terms of some of the arguments
23 that are being made to the Court. So with that on the record,
24 Mr. Keiffer, I'll hear from you first.

25 Am I going to get any evidence from you today, or am

1 I going to rely upon the affidavit that was submitted by
2 Ms. Wexler?

3 **MR. KEIFFER:** Your Honor, Paul Keiffer for the
4 Debtor.

5 We will rely upon the Amended Declaration of
6 Ms. Wexler and its context at this time which was not
7 anticipated to be an evidentiary hearing, but argument on the
8 evidence submitted by paper.

9 We understand that this is not a broad TRO, sweeping
10 national scales. To the extent that there is any implication
11 that that's what may have been sought in the Complaint that
12 will be cured shortly in an Amended Complaint, this is only to
13 deal with the specific situation with this specific
14 circumstance with regard to this specific Debtor's
15 circumstance.

16 We also have read through Judge Jones' admonitions
17 regarding to the extent to which he would be able to -- that
18 his court would be able to act and we have no qualms with those
19 points. We're not seeking to go beyond the nature and the
20 circumstances of this particular case.

21 **THE COURT:** All right.

22 **MR. KEIFFER:** As far as -- I'll address the first
23 come, first serve element in regards to this and the reason why
24 we ask to be put back in the queue at the place, in effect,
25 where we were, and in this sense because the Debtor -- it is

1 our understanding that, at least, to in effect refuel and the
2 refilling of the tank, that is the loan fund, the debt
3 loan/land fund, is going to pick up and take on where people
4 were since then. We would try in each instance, you know, we
5 tried on April 3rd, we tried as noted in the Amended
6 Declaration, to get an application in.

7 The SBA's (indisc.) addition of this bankruptcy
8 standard, the denial of its ability to participate, has left
9 the Debtor with no way to functionally get into the program.
10 There is no other methodology by which you can get to this
11 program. Delay will, in effect, cause it to have no relief, no
12 remedy. It is without having an ability to get to -- back to
13 where it was, or at least be seen as a proper applicant, it
14 seen as a proper applicant, the bar that kept it from getting
15 there, the fact that it received two notifications through its
16 processes to qualify for 700 and 706,000 dollars. Those are --
17 that's the reason why we want to get back where we were because
18 we were properly and promptly before the SBA -- actually we
19 went through our lender to get this loan, to get this
20 loan/grant.

21 If your Honor -- with regards to the second element,
22 how can the SBA -- compel the SBA to allocate \$700,000 with
23 regard to this?

24 That's just a difficult question I would like the
25 opportunity to brief on that. I don't have any other answer

1 than it basically means that there is no remedy to the Debtor,
2 there's nothing that can happen here if there is no allocation
3 set aside. It means that the Debtor's ability to participate
4 in a PPP under wrongful circumstances is wholly after the fact
5 and that those were hardly adequate -- an adequate remedy at
6 law for a debtor that could likely 9:43:42 without having this
7 relief.

8 Your Honor, if I may I'll proceed to my argument if
9 that's what the Court would like unless the Court has a
10 questions before I get into that?

11 **THE COURT:** No, sir, thank you. You may proceed and
12 take your time.

13 **MR. KEIFFER:** Thank you. I don't intend on spending
14 an inordinate amount of time addressing the Debtor's line of
15 business, but it is education materials and test preparation
16 generally.

17 Or that the Debtor's employees are working hard to
18 keep its business afloat and is following the requirements in
19 the detailed Final Cash Collateral Order with its modified
20 sales procedures and monthly budgets and user funds, approve
21 the process, go along with the Debtor's obligation to file
22 Monthly Operating Reports which was done timely and properly.

23 What I do intend to go into -- what I do intend to do
24 is to ask the Court to note the more detailed description of
25 the Debtor's business, what has happened to the Debtor on

1 account of COVID-19 significantly reductions in payments to
2 staff and offices, as well as slow account receivable
3 collections, needing to sell an asset at discount to continue
4 towards meeting its requirements to move to a new facility, to
5 adjust lease and to address the likely sale of the -- of
6 Asteria in July 2020.

7 I also want the Court to note, as Ms. Wexler noted in
8 her Declaration about the Debtor, sought the PPP loan/grant
9 that started on April the 3rd, the first day that software and
10 forms were available. Since Cadence -- through the SBA lender,
11 the Debtor went through Cadence through the SBA interface
12 performed by SmartGroup.com and the Debtor also tried to apply
13 for PPP loans through PayPal, another pre-petition lender for
14 the Debtor.

15 I want the Court to note that the application process
16 via Smart Group and PayPal did not let the Debtor's application
17 proceed to completion. Both denied such application solely,
18 solely because the Debtor was a Chapter 11 -- the applicant was
19 a Chapter 11 debtor.

20 The automatic denial was on account of the specific
21 provisions in the SBA/PPP application form which noted that
22 "Answering yes to any of these two questions would result in a
23 denial of any rights to a PPP loan/grant."

24 I'll refer the Court to Exhibit G, Mrs. Wexler's
25 Amended Declaration, see Docket 18:

1 "If questions 1 or 2 below are answered 'yes,' the
2 loan will not be approved."

3 "QUESTION: Is the business or any owner ... presently
4 involved in any bankruptcy?"

5 Debtor, of course, had to answer yes, it was a
6 Chapter 11 Debtor-in-possession.

7 As noted in Ms. Wexler's Declaration there is no
8 other aspect to the Questions on Exhibit G which would have
9 disqualified the Debtor.

10 In using the SmartGroup.com application the Debtor
11 was able to press ahead with filling out the remainder of that
12 form and submitted data for calculating its PPP loan/grant
13 amount it could seek based upon 2.5 times payroll as limited by
14 the statute.

15 See Exhibit D from April the 8th, Smart (indisc.)
16 told the Debtor it qualified for a \$706,000 program, please
17 continue.

18 Also to Exhibit C which Smart (indisc.) on 04/10,
19 9:00 a.m. He indicated to Debtor that it was eligible for a
20 700 K PPP loan/grant, please continue.

21 I want to note this quickly, the Debtor is not
22 pursuing, has no qualms or gripes with Smart (indisc.), PayPal,
23 Cadence or any other of the lenders in their faithful carrying
24 out of what the SBA told them they had to carry out. This is
25 an SBA issue, it's not an issue with the lender.

1 As noted in Ms. Wexler's Declaration that did not
2 last long because on April 11th at 10:03 p.m. Debtor was told
3 it was denied for one of four reasons. See Exhibit E.

4 If presently involved in any bankruptcy questions,
5 one of the two automatic outs is the only one that the Debtor
6 had to answer yes to.

7 It is clear that but for the effects of Question 1
8 above the Debtor could have been sent \$700,000 and would be
9 able to convert that obligation of those grants if not 100
10 percent, then likely a very, very high percentage.

11 As the Court knows and has alluded to in the Amended
12 TRO application, the initial round of funding that the SBA
13 hoped to administer over 340 billion was allocated and sent out
14 to millions of entities.

15 The Debtor filed its eighth Adversary proceeding
16 against the SBA on April 21st, the initial trans (indisc.)
17 funds save for some returns was capped by April 16th, 2020,
18 less than two weeks later.

19 The Debtor, as detailed in Ms. Wexler's Declaration,
20 started seeking funds on April 3rd at the very beginning of
21 this process -- of the program. As the Court recalls the
22 Debtor sought authority to seek the PPP loan/grant on March
23 27th, (indisc.) Docket 112, secure the authority so to -- to
24 seek a PPP loan/grant insofar as doing so would not generate a
25 default under the Final Cash Collateral Order requirement that

1 the Debtor not use unauthorized credit. That Order was entered
2 on April 8th with the Motion and Order noted to be able to get
3 those funds still required a further Order that made clear that
4 the PDP (s/l) loan didn't violate the protection -- the
5 priorities that the lender enjoyed to the Debtor's pre and
6 post-petition collateral.

7 Not a real problem, though, it's not a real problem
8 as the PPP loan/grant is an unsecured no collateral transfer of
9 funds. There are no guarantee requirements and there is no
10 recourse for the owners of the entity as to repayment.

11 You're going to hear a lot from the SBA about a sound
12 policy regarding lending. There's nothing about these changes
13 that Congress made for this specific circumstance that has
14 anything to do with sound lending. This is a grant, in effect,
15 this is large S (phonetic) of the Government only, no one can
16 do this but the Government.

17 Neither the CARES Act nor the SBA Interim Final Rule
18 at that juncture made any -- prohibited any applicant for a PPP
19 loan/grant from seeking same on account of it being a Chapter
20 11 debtor.

21 If you look at the prior version, the April 3rd
22 version converted to C.F.R. on April 15th the requirement for a
23 loan program participation was suspended.

24 Now in the subsequent revision that happened after
25 this application went through they took that provision out. I

1 don't know why they took it out, but they did it when they made
2 their bankruptcy changes last week.

3 Nevertheless, Debtor was denied a timely, otherwise
4 qualified application because the SBA imposed a requirement on
5 distributing PPP loans and funds to businesses presently
6 involved in any bankruptcy.

7 Subsequent to the enactment of the amendment to the
8 CARES Act which added another 300 billion plus to the SBA
9 lender to administer the SBA issued its fourth Interim Final
10 Rule, see footnote 2, Docket 17 in the Adversary proceeding.

11 So the SBA expressed its rationale for why it added
12 the (indisc.) exclusion on account of involvement in any
13 bankruptcy. After noting that any applicant (indisc.)
14 condition is ineligible, the SBA made these assertions as to
15 why:

16 PPP loan/grants, the Debtor presents an unacceptably
17 high risk of unauthorized use of funds and nonpayment of
18 unforgiven loans.

19 The SBA had another rationale, but that was only
20 applicable to applicants who secured a loan, but had not filed
21 -- had funds dispersed, had then filed bankruptcy, generally
22 consistent with 355(c)(2), at least facially, but it is not
23 applicable here. The Debtor was not with -- was a debtor in
24 possession before it applied and that rationale has no basis,
25 it cannot apply here.

1 Regardless the issue is the SBA, in adding the
2 gatekeeper function of "involved in any bankruptcy" exceeded
3 statutory authority and in exceeding that statutory authority
4 the SBA violates Section 525 of the Bankruptcy Code, first
5 which addressed the issue of whether the SBA exceeded its
6 authority.

7 As noted in the Amended TRO Application, and as noted
8 in its main case Motion previously referenced, the CARES Act
9 addresses bankruptcy issues. The CARES Act timely addressed
10 bankruptcy issues directly and forcefully. Section 1113
11 revises Subchapter (5) and Chapter 11 of the Bankruptcy Code
12 temporarily allowing business debt limits to rise from 2.7
13 million to 7.5 million stating which cases could use that limit
14 increase.

15 Modified current monthly income requirements to
16 exclude (indisc.) funds of any source. The \$1,200 check to
17 individuals was made no part of its currently monthly income
18 determination in a Chapter 13. However, Congress specifically,
19 in Section 4003 of the CARES Act explicitly does not allow mid-
20 sized 500 plus employees and more any CARES Act funding if they
21 are a Debtor in a bankruptcy proceeding.

22 Congress can make these decisions, Congress had a
23 specific exception for the Packers and Stockyards Act
24 (phonetic). It can make these revisions, Congress can do this
25 if SBA is not able to take that next step.

1 Solvency is an issue in the Federal Reserve's role
2 with regards to large enterprises. Congress did not prohibit
3 Chapter 11 debtors with under 500 employees from participating.
4 Unlike mid-sized and large firms that access the capital market
5 Congress did not impose such restriction on the small business
6 tier. Congress made bankruptcy insolvency an issue for mid and
7 large sized enterprises. Congress also knew that it was not
8 making a bankruptcy a disqualifier for the small business tier.

9 Congress addressed bankruptcy issues throughout the
10 CARES Act as noted when it did not put a bankruptcy prohibition
11 of small business entities.

12 So what are the qualifiers and restrictions of the
13 Small Business and PPP loan/grants?

14 First, businesses had to have no greater than 500
15 employees.

16 Second, considerations in evaluating eligibility the
17 borrower could have covered loans at the times described in the
18 paragraph, however, shall consider whether the borrower is in
19 operation on February the 15th, check, Debtor meets that
20 requirements.

21 Had employees, when borrower pays salaries and taxes,
22 Check, Debtor meets that requirement.

23 Or paid -- and/or paid independent contractors as
24 reported on Form 1099 Miscellaneous, check, the Debtor meets
25 that as well.

1 No where in the SBA is the SBA granted any
2 exclusionary authority. Look at the borrower requirements in
3 G, certifications. Debtor meets or will meet all of those as
4 well.

5 Credit, elsewhere requirements, gone.

6 Where does the SBA draw its authority for for the PPP
7 loan program application procedure to prohibit an application,
8 an applicant, a business or itself or a business who has an
9 owner or matter their percentage of ownership.

10 The SBA has now stated "we did it in our other form,"
11 in a prior existing form and I believe they filed it this
12 morning at 6:10.

13 I will address those particularly when I go into the
14 -- the position specifically but I want to finish my
15 presentation first.

16 **THE COURT:** All right. Go ahead, sir.

17 **MR. KEIFFER:** Pardon me. SBA has noted in the
18 Seventh District of Texas matter that the SBA has broad
19 authority to construe a statute that may be silent as long as
20 it is based upon a permissive construction of the statute. But
21 there must be a permissive construction available to latch
22 onto. There isn't one, not in the CARES Act Subsection 36
23 which is a self-contained program, but whether or not authority
24 is here in this Adversary proceeding as noted in the main case,
25 there is no nexus to rule out bankruptcy debtors for PPP

1 loan/grants when Congress, when setting up the CARES Act and
2 amendments, specifically excluded debtors-in-possession or had
3 insolvency protection the midsize and large debtors but did not
4 add such a provision to the small business debtors. It's not
5 an invitation to fill in the gaps, it was a decision not to
6 have the bankruptcy -- not to have bankruptcy be a bar to small
7 business enterprises. This means that the bankruptcy addition
8 was an arbitrary and capricious act grounded after the fact in
9 a rationale that holds no water whatsoever. This stated
10 rationale is that Chapter 11 debtors are prone to unauthorized
11 use of funds, that somehow those funds, by coming into the
12 estate, (indisc.) status of an administrative expense fund.
13 But even that strange statement, so antithetical to Chapter 11
14 practice, is not enough to take these actions taken on April
15 2nd out of the realm of arbitrary and capricious actions. That
16 is so because the loan, (quote), to a Chapter 11 debtor per a
17 PPP is easily converted wholly or largely to a grant. Paid
18 salaries in full get money in the hands of employees, pay
19 landlords, pay other lessors, pay interest on debt, all of
20 those in the context of a debtor with roughly 250,000 a month
21 in full -- at full load for employees, interest accruing at
22 over 21,000 a quarter on the first lienholder, rent due at
23 39,000 for May to a soon to become a landlord, all of these
24 were argued towards being -- this loan being converted into a
25 grant is functionally a grant if it was given.

1 But the issue is not that specific and is very
2 constructive -- in a very construction of the program itself.
3 It is the only type of funding of its kind. No funding in a
4 small business commercial tier is made on an unsecured basis
5 without guarantees from principals and no (indisc.) to owners
6 (indisc.) fraud or criminal activities.

7 The PPP loan/grant is a broad-based stimulus to the
8 economy to help cope with the massive economic effect that the
9 -- the steps taken to address COVID-19's rumble through our
10 populous has generated. This is not a guarantee of a loan. At
11 some portion of -- (indisc.) collateralized and guarantees and
12 otherwise similar to commercial lending circumstances that
13 (indisc.) the SBA's charge up to this point. A boost for small
14 businesses who need a (indisc.) to go and to help regarding
15 normal financial circumstances, that is not what is before us.

16 No, this is a broad and general life-preserver thrown
17 out to small businesses with very few restrictions. Here the
18 only restriction affecting the debtor is its status as a
19 Chapter 11 debtor-in-possession, that and nothing more.

20 As noted in our authorities, there is no direct or
21 detailed requirement in the (indisc.) SBA (indisc.) program
22 that mentions bankruptcy save for a question that is noted in
23 the SBA brief, Number 6 and Number 24 on a form, but nothing in
24 any of this and the C.F.R. that we found, there is nothing in
25 the statute itself, that in this massive distinction between

1 the Form 1919 and the form we're looking at here, in those
2 instances is the question "Did you file bankruptcy?" either the
3 entity or the affiliate or the principal.

4 And those were not absolutely, on their face, to be a
5 disqualifier, they were merely a part of the credit worthiness
6 standard that the lenders administered that pre-CARES Act
7 program would use to otherwise cull out any Chapter 11 debtor
8 because in that concept it doesn't violate Section 525 in its
9 discrimination. It doesn't discriminate on them, it's just the
10 factor of a credit assessment.

11 This is a different kettle of fish that you're in
12 bankruptcy you can't do it, you can't apply. There is no
13 credit worthiness standard, a non-debtor, small business can't,
14 be insolvent. Whether your shut its doors. And yet, if it
15 uses the funds to stay open for eight or so weeks, you're
16 still insolvent, non-debtor entity gets a grant instead.
17 Nontaxable at that while an entity that utilizes the processes
18 and requirements to Title 11 of the U.S. Code. Well, sorry,
19 your bankruptcy status alone is the basis for refusal to allow
20 a PPP loan/grant to be issued.

21 Under Section 525 Jurisprudence this is the key,
22 that the Government, the gatekeeper, the one who determines who
23 may pursue a livelihood or who may survive the pandemic effect,
24 these PPP loan/grants are to be given indiscriminately to any
25 entity suffering from the effects that COVID-19 has on the

1 economy, just have less than 500 employees. This is an
2 educational support business, (indisc.) tutoring, all functions
3 that have been blasted by school closings by mid-March through
4 the end of the school year, this is an affected qualified
5 business, but solely because it is a debtor in bankruptcy, not
6 based on (indisc.) decisions, but merely is cited as a debtor
7 bars them from getting a PPP loan/grant.

8 Why else would Congress, 100 percent guaranteed
9 lenders, why would Congress require the Feds to pump in
10 liquidity in the capital markets and send support to lenders
11 under this program?

12 Why let lenders only have to verify certain nominal
13 points, none of which are normal commercial loan standard
14 requirements if this is merely an adjunct to an existing
15 financial system or just a modification of the SBA's normal
16 (indisc.) program? It clearly is not.

17 This only happens in an egregious national emergency.
18 The (indisc.) the SBA says no Chapter 11 debtor can get a PPP
19 loan -- sorry, a PPP loan/grant. Why? Because of their
20 involvement in a bankruptcy, Section 525 discrimination
21 couldn't be clearer. But the SBA acted in such an arbitrary
22 and capricious fashion adding a requirement nowhere in the
23 emergency statute that is meant to help all American small
24 business affected by the necessary responses to COVID-19
25 assault on our citizens, now having killed more people in three

1 to four months than seven years in the Vietnam War, to decide
2 to exclude debtors when Congress expressly excluded mid-size
3 and large size entities is the height of arbitrary and
4 capricious fashion. That is not -- there's a few things here.

5 That removes the restrictions on injunctive relief
6 which courts can impose on the SBA. It can't be sued and can't
7 sue in any court (indisc.) anti-injunction provision just like
8 any other party in this context.

9 But the SBA acted blatantly beyond the scope of the
10 intended CARES Act that any injunction shield disappeared.

11 Judge Jones in *Hidalgo* said it well and you noted,
12 Page 59, Dockets Number 17, lines 9 through 21.

13 "I simply do not accept that when I have evidence of
14 bankruptcy discrimination that I can do nothing about
15 it. And if I am wrong about that, I am very certain
16 my (indisc.) colleagues will tell me that I'm wrong
17 and I will accept that criticism, but this can't be
18 what Congress intended. This can't be the way that
19 we are supposed to treat our fellow man in this town.
20 It's inconceivable to me that this distinction can be
21 drawn. The people that need the most help and have
22 sought protection under our laws are the people who
23 are targets of discrimination in the government
24 support (indisc.). This can't possibly be."

25 Now to deal with the Court the last issue, that the

1 SBA is not instructed to hold aside \$700,000, the debtor will
2 not -- will be a tattered and twisting -- will be tattered and
3 twisting in the wind, employees to be furloughed and the
4 business will likely fail for a pittance of its real worth once
5 a new normal can be established, all because it is a debtor in
6 Chapter 11 (indisc.) an arbitrary and capricious wholly
7 unauthorized (indisc.) without any rational relationship in the
8 fact of how Chapter 11's are conducted and supervised.

9 Something more than a (indisc.) is required here.
10 The SBA needs to be required to set aside 700,000 and this
11 matter certainly needs to be moved to a proper conclusion, the
12 debtor being a PPP loan/grant recipient because it applied
13 timely, is qualified to get the loan and it -- it convert all
14 or practically all of this into a grant. Debtor played by the
15 rules, filed timely, it should not be punished for being a
16 debtor in bankruptcy when similarly challenged, likely equally
17 insolvent entities can get the money and the SBA only gets to
18 look at that entity as the unsecured debt holder as to any non-
19 grant portion.

20 I'd like now to (indisc.) to point out the SBA's
21 (indisc.) and make some responses specifically to points made
22 in the brief.

23 **THE COURT:** Okay, but take your time.

24 **MR. KEIFFER:** Thank you, your Honor. The SBA notes
25 on Page 4 of their brief that they extended operating

1 procedures that exist on SBA Form 1919.

2 But those were all, as noted, (indisc.) having look
3 at that Form 1919, there is a series of -- hold on just a
4 second, your Honor ---

5 **THE COURT:** Sure.

6 **MR. KEIFFER:** -- I'm checking my computer -- there it
7 goes.

8 On 1919, Question Number 6 is a series of questions:

9 "Unless stated otherwise if any of the questions
10 below are answered yes, please provide details on a
11 separate sheet."

12 (indisc.) as a small business applicant or its
13 affiliates ever filed for bankruptcy protection
14 (question mark)?

15 It's one of 11 questions. The remainder of these
16 questions talk about "Have you obtained a SBA loan?" "What
17 type of operations do you run?," normal credit-related
18 circumstances.

19 The second question is Number 24 in its reference is
20 regards to the same thing:

21 "Have you or any business you control -- this is
22 regarding the principal -- ever filed for bankruptcy
23 protection?"

24 Again, all decisions -- all are elements to be able
25 to touch upon credit decisions, credit determinations that

1 would need to be made in determining whether to grant the loan.

2 Moreover, if the Court would note, the Interim Final
3 Rule Number 2 on the April 3rd version, also in the C.F.R. on
4 04/15 but subsequently removed, indicated that the -- stated
5 the suspension of the requirements under 13 C.F.R. 120.10 on
6 loan -- let me make sure if that describes loan -- pardon me,
7 your Honor, just a second --

8 **THE COURT:** That's fine.

9 **MR. KEIFFER:** I'm trying to find the specific
10 language in that former and then final rule --

11 **THE COURT:** That's fine, sir, take your time,
12 Mr. Keiffer, I'll wait.

13 **(Pause)**

14 **MR. KEIFFER:** Here it is.

15 On Page 5 of that document that was issued on April
16 3rd and put in the federal (indisc.) (indisc.) federal register
17 -- federal regulations, it stated:

18 "Lender must comply with the applicable lender
19 obligations set forth in this Interim Final Rule but
20 will be held harmless to borrower's failure to comply
21 with program (indisc.). (indisc.)

22 None of these (indisc.) borrowers violations of
23 fraud (indisc.) interim final rule.

24 The program requirements of the PPP identified in
25 this Rule temporarily supersede any conflicting loan

1 program requirements as defined in 13 C.F.R. 120.10."

2 As we noted at the hearing previously regarding the
3 -- pardon me, your Honor -- and in securing the approval of the
4 loan/grant those loan program requirements suspension is a very
5 significant point. At the time that the submission was noted
6 there was nothing in there that would have in any way, shape or
7 form restricted bankruptcy except for the application element
8 that was modified from a previous Form 1919 from a credit
9 worthiness element to an absolute bar.

10 There is nothing that Congress did that gave the SBA
11 that broad grant of authority in this context to add new
12 requirements when Congress itself, in doing this, adopted the
13 (indisc.) for what the active state stated itself, in
14 particular --

15 Hold on just a second here.

16 Under said Part B under 1102, (indisc.), entitled
17 "Increased eligibility for certain small business and
18 organizations.

19 In general, wherein in the covered period, in
20 addition to small business concerns, any business concern,
21 nonprofit organization, veterans organizations, travel
22 business, et cetera "shall be eligible to receive a covered
23 loan (indisc.) the business concern, nonprofit or private
24 business concern employs not more than 500 employees."

25 "Further, borrower requirements: Borrower must

1 certify or applicant applying for a covered loan
2 Shall make a good-faith certification that
3 uncertainty of current economic conditions made
4 necessary the loan request to support the ongoing
5 operations of the eligible recipient.

6 2. Acknowledging that the funds will be used to
7 retain workers, maintain payroll and make mortgage
8 payments, leases and utility payments.

9 3. That the eligible recipient does not have
10 an application pending for a loan under this
11 subsection or for the plain purpose of duplicative
12 amounts applied for or received under a separate
13 loan. And

14 4. During the period beginning on February 15, 2020
15 and ending on December 31st, 2010, if the eligible
16 recipient has not received amounts under this
17 subsection for the plain purpose (indisc.) amount."

18 Then there's the sense of the Senate, this is
19 actually in the statute:

20 "Sense of the Senate. It is the sense of the Senate
21 that administrators should issue guidance to lenders
22 and agents to ensure that the processing of (indisc.)
23 covered loans prioritize small business concerns and
24 entities and under reserved and rural markets
25 including veterans and members of the military, small

1 business concerns owned and controlled by socially
2 and economically disadvantaged individuals as defined
3 under 8(b)(3)(C), when in business and operation less
4 than two years."

5 This Debtor is a minority-owned business. But that
6 didn't -- the Senate is being bypassed and overrun by the fact
7 that the SBA proved in its former form to go from a credit
8 worthiness standard to a gatekeeper standard -- bankruptcy
9 (indisc.). If I may just present more, I have a little bit
10 more to review, your Honor, real quickly.

11 **THE COURT:** That's fine. Again, take your time,
12 Mr. Keiffer, I'll patiently wait to hear everything you want to
13 say, sir.

14 **MR. KEIFFER:** Thank you, your Honor.

15 And I'll use the pauses in these circumstances.

16 **THE COURT:** You can.

17 **(Pause)**

18 **MR. KEIFFER:** The SBA relies upon this particular
19 requirement that they assert it's not affected by (indisc.).
20 And it is our assertion that that is not disingenuous.

21 The argument about sound value to reassure payment is
22 disingenuous, it's such a huge, huge portion of the PPP loan/
23 grant will become grants and repayments can only come from the
24 entity itself at unsecured status.

25 The SBA has no particular ability to assure itself of

1 repayment here. This isn't a circumstance with sound loan
2 practices can be sound value which secured as reasonably to
3 assure repayment is involves. This is (indisc.) in, dump into
4 the economy of significant funds to keep people afloat, to keep
5 people alive, to enable business to continue, and that it
6 doesn't -- there's no reason and as Congress spoke, it made it
7 clear that it was going to restrict those for mid and large
8 sized companies. You can't if you're insolvent (indisc.) if
9 you had solvency issues if you're a large corporate entity,
10 mid-size, over 500, if you're in a bankruptcy proceeding.

11 But under that there is nothing that Congress said
12 you could do that would prohibit it.

13 Past lending, here in bankruptcy, past lending has
14 higher priority than what is (indisc.). Let's look at this in
15 the other context (indisc.) on sound value for (indisc.) to
16 reasonably assure repayment.

17 Outside of bankruptcy, all of the existing debt
18 structure remains where it is. You have a circumstance where
19 you likely have large, over-secured creditors -- I mean under-
20 secured creditors. In a normal context, it would be
21 competitors for those funds. There's nothing about these
22 (indisc.) the loan grant that gives the SBA any particular
23 precedent, priority, position, benefit over any other creditor
24 that exists of this (indisc.) that entity. This is merely a
25 payment to make sure that people can stay afloat during this

1 pandemic. And this pandemic relief, this pandemic life
2 preserver is being denied to small business debtors without any
3 authority. The SBA argues that what it has, it has a resident
4 capacity based upon that sound value standard to add these.
5 But 836 controls the program and it is not -- and has no such
6 assessment requirement to assure repayment. It has loan
7 statements and circumstances (indisc.) up to ten years. The
8 qualifications are clearly non-commercially based. This is a
9 government benefit, this is a government stimulus. This is not
10 the accompanying and support of the nurturing of small business
11 which is the general practice and obligation of the Small
12 Business Administration since its inception. These are
13 peculiar and bizarre times. And to be able to try to refashion
14 this circumstance and to somehow fit into that by virtue of the
15 ostensible authority of the SBA to impact or to make
16 regulations to implement what Congress has given it the power
17 to do so runs wholly squarely against what Congress basically
18 said on the issues of bankruptcy. Large firms, no; small
19 firms, yes; midsized firms, no; small firms, yes. There's
20 nothing in there that prohibits bankruptcy -- bankrupt debtors
21 in bankruptcy or individuals who are involved in bankruptcy for
22 that matter from being able to seek PPP lending.

23 Regarding the preclusion of injunctive relief, the
24 answer to preclusion of injunctive relief is pretty
25 straightforward. When you exceed your authority, you have the

1 ability to enjoin. And the -- what we have here is that -- and
2 (indisc.) the SBA responds particularly around page 11.
3 Conditioning a loan on whether a party receiving loans in
4 bankruptcy does not violate Section 525 because the loan is not
5 a grant. In each of those instances that are cited that I've
6 had the opportunity in the short time to be able to review,
7 which has been almost nil, these are loan guarantees or loan
8 assistance programs that you had to go through an application
9 process that had -- that I see no citations for specific
10 bankruptcy -- the statute that tells you that parties in
11 bankruptcy do not -- are not able to apply. I do not see any
12 indication that something similar to a gatekeeper function in
13 this instance the SBA has cited because you're in bankruptcy,
14 you're not qualified. They make a stipulation that it needs to
15 be similar to a license, permit, charter, or franchise
16 (indisc.) Section 525. But this is a similar grant. This is a
17 grant to small businesses. This is -- it may be a hybrid but
18 it's largely, it's almost exclusively a grant to most all
19 businesses out there that are going to follow this. And
20 (indisc.) remainder, all of these are all in a circumstance
21 regarding programs that are specifically dealing with
22 disparate, pre-CARES programs that were (indisc.) that Congress
23 had made decisions on how to address the effects of the market
24 in regard to certain parties and the policies needed to resolve
25 those. But none of those deal with something as broad as a

1 grant here (indisc.) CARES Act. I think that their application
2 is beyond that. There's not (indisc.) similar argument that
3 somehow it needs to be like a driver's license to be like -- to
4 be (indisc.) similar grant. In this instance, this is clearly
5 a grant to the whole public of the United States, I mean all
6 small businesses, the only exclusionary (indisc.) if you're in
7 bankruptcy. This makes it -- because it's filed as a 525, this
8 makes it a core proceeding and this bankruptcy court may submit
9 an order. Bankruptcy court necessarily then has jurisdiction.

10 The paragraph on page 15 of 24, the SBA notes
11 regarding a case (indisc.) Oklahoma (indisc.) unless Congress
12 has directly spoken to the precise (indisc.) issue (indisc.)
13 only whether (indisc.) answer is based on permissible
14 construction of the statute. But Congress did speak in the
15 CARES Act. It addressed BK (phonetic) multiple times,
16 excluding BK by statute, something it alone expressly can do.
17 It goes further to say that Congress has explicitly left a gap
18 for the agency to fill, and that is a supposition here. That
19 is a supposition. This is not a gap left for the agency to
20 fill. There is an express delegation of authority to elucidate
21 a (indisc.) provision of the statute by regulation. There is
22 nothing to that effect. Some legislative delegation on an
23 agency to a particular question is implicit rather than
24 explicit. In such places, the Court may not (indisc.)
25 construction of the statutory provision (indisc.) reasonable

1 interpretation made by the administrator or agency. And here
2 there is no gap to fill. This is a loan grant available to
3 help the companies (indisc.) pandemic effect on the whole of
4 the economy in the United States, and the only bar (phonetic)
5 here that applies to debtors (indisc.) status as a Chapter 11
6 debtor. And that was not the hole that was left to be filled.
7 That was something that the SBA took upon itself.

8 Carrying out this title is not a call to modify or
9 add limitations to what Congress said was to be an expanded no
10 credit (indisc.) as a whole. Congress addressed solvency in
11 bankruptcy in mid and large entities and expanded it to small.
12 Until the SBA added its arbitrary exclusion filter (indisc.)
13 sound value when all hallmarks of sound value are statutorily
14 removed. This discretion is not so broad as to enable the SBA
15 to add conditions to programs that Congress added to other
16 (indisc.) economy but clearly did not do here. Exigencies
17 (phonetic) in this crisis are not a basis to overcome the CARE
18 Act -- CARES Act specific (indisc.) prohibition -- specific
19 non-prohibition. This is in response to the CARES Act did not
20 amend or otherwise limit this authority (indisc.) 634(b)(6) of
21 Title 15. The SBA goes on to say instead Congress explicitly
22 included PPP and Section 7A lending programs, thus (indisc.)
23 administrative broad discretion over the PPP indeed rather than
24 preparing administration -- administrative discretion of the
25 PPP, the CARES Act expanded it by giving administrative

1 authority (indisc.) regulations and rules to implement the PPP
2 without complying with typical notice procedures. But that
3 exigency, that circumstance in regard to (indisc.) basically
4 give you the (indisc.) to what the statute references in regard
5 to issuing regulations, let me find that, your Honor, hold on.
6 Pardon me, your Honor.

7 **THE COURT:** That's fine, Mr. Keiffer.

8 **MR. KEIFFER:** Just letting you know I'm not done.

9 **THE COURT:** I beg your pardon?

10 **MR. KEIFFER:** Just letting you know I am not done.

11 **THE COURT:** All right.

12 **MR. KEIFFER:** Section 1114, emergency rulemaking
13 authority, not later than 15 days after the enactment of this
14 Act, the administrator shall issue regulations to carry out
15 this title and the amendments made by this title without regard
16 to notice requirements under 553 of Title 5, United States
17 Code. That did not say fill in gaps that we didn't -- that we
18 intentionally didn't have, didn't ask you to fill in. It just
19 said to carry out this title, follow the instructions, don't
20 add your own elements. We added bankruptcy prohibition, "we"
21 being Congress, where it was necessary. It was signed into law
22 that bankruptcy became an issue only at the mid and large-sized
23 level. It was not to be an issue at the small level. Congress
24 knew what it was doing. Congress didn't do this. And this
25 regulatory instruction is to carry out this title, not to

1 modify.

2 Again, it's boggling that the continued statement as
3 to the basis for this is sound value. But Congress made
4 determination that no credit issues would exist, there's no
5 credit assessment, none whatsoever. The sole requirements are
6 to (indisc.) program enabling (indisc.) I'm sorry and the loan
7 -- and that loan program (indisc.) enabling legislation. The
8 SBA notes the SBA was required to make decisions about how to
9 reconcile shall (indisc.) incurring the sound value of loan
10 (indisc.) within the overall concept of the CARES Act. That is
11 such a strained and flawed basis. There is no recognition
12 (indisc.) functional that the loan can functionally be a grant,
13 that there is no assessment of sound value loan making when
14 \$650 billion is disbursed in less than a month.

15 The Debtor -- I mean, the SBA cites the case of
16 *PROFILES* about the potentially unknown effects and the Congress
17 has determined the SBA's implementation cannot be subject to
18 injunction. The *PROFILES* case is a non-bankruptcy matter where
19 the lending institution, Bank of America, was sued for not
20 accepting a non-customer (phonetic) application. There is no
21 statutory (indisc.) such as 525 for such an action. Private --
22 plaintiffs asserted a private right of action against Bank of
23 America and the SBA is not even a party. The court denied the
24 request. The Debtor has no quarrel with its lenders in this
25 matter and has no quarrel with the *PROFILES* case, but it is

1 inapplicable in this case. This case (indisc.) 525 (indisc.) a
2 similar grant should not be conditioned, should not be
3 discriminated against based upon the debtor's status as a
4 chapter -- as a debtor in possession (indisc.) bankruptcy in
5 the first place. Debtor (indisc.) SBA notes the SBA has a
6 clear policy to exclude bankrupt entities from PPP lending
7 because such lending (indisc.) unacceptable risk of
8 unauthorized use of funds for non-repayment (phonetic) of
9 forgiven loans. Again, there is no basis for such (indisc.)
10 high risk.

11 It is the (indisc.) top of page 22, the SBA makes a
12 note (indisc.) Congress's statutory (indisc.) preliminary
13 injunctive relief altering the scheme (phonetic) in addition to
14 noting we're only asking relief for this specific debtor. It
15 is the SBA that altered the statutory scheme, not the Debtor.
16 While adding a bankruptcy question to worthy --
17 creditworthiness applications is consistent with sound lending
18 policy for a real loan for a real loan, for a (indisc.) grant
19 given without credit determination making a bankruptcy --
20 making for a bankruptcy exclusion when Congress chose not to is
21 beyond the administrative authority. Your Honor, that's the
22 end of the presentation that I have, your Honor, (indisc.) an
23 opportunity to rebut (indisc.)

24 **THE COURT:** Couple housekeeping matters and then a
25 couple questions. You indicated that Ms. Wexler is not on the

1 phone; is that correct?

2 **MR. KEIFFER:** That is correct.

3 **THE COURT:** All right, so let me -- you had
4 attachments to your TRO, her declaration, her affidavit, and
5 then some exhibits that attached to that. Do you, one, want to
6 make that part of the record? And then, second, I'll ask
7 opposing counsel whether or not she objects to their admission.
8 So do you want to include the affidavit or declaration, I'm
9 sorry I don't recall what it is, with the attached exhibits
10 indicating Ms. Wexler's efforts in trying to obtain a PPP loan?

11 **MR. KEIFFER:** Yes, your Honor, it is at Docket 17 and
12 18; 18 is the correction and 17 filed the amended declaration
13 without the exhibits, 18 filed the declaration with the
14 exhibits. And, yes, I do want the admission of the declaration
15 as well as the admission of the exhibits attached.

16 **THE COURT:** Ms. Sinesi, the declarant is not
17 available on the phone. Do you object to the admission of
18 these documents and her declaration?

19 **MS. SINESI:** Good morning, your Honor. This is
20 Dominique Sinesi on behalf of the SBA. Yes, we object to the
21 declaration as we have not had the opportunity to cross examine
22 or depose this witness.

23 **THE COURT:** All right, so --

24 **MR. KEIFFER:** (Indisc.)

25 **THE COURT:** -- if I may, so, Mr. Keiffer, what's your

1 response to that?

2 **MR. KEIFFER:** Well my response to that, your Honor,
3 is that generally speaking temporary restraining order on
4 notice hearing in this context is appropriate to be done by
5 declaration. If it's necessary to get -- there's been never --
6 no communication regarding whether the client would be needed
7 at this matter. We didn't even know when the SBA was going to
8 respond until this morning at 6:00 o'clock this morning that
9 they were going to -- that we had an idea (indisc.) didn't know
10 that there was any issue regarding the declaration of
11 Ms. Wexler. There's been no objection whatsoever made it in
12 the papers, the 24-page long papers, there's any objection to
13 the declarant's testimony.

14 **THE COURT:** Before I hear from --

15 **MR. KEIFFER:** (Indisc.)

16 **THE COURT:** If I may, Mr. Keiffer, before I hear from
17 Ms. Sinesi, couple things. Number one, it was set on an
18 expedited basis. And I agree with you, I would have preferred
19 to have been favored with a brief sooner than 6:10 this
20 morning, but that's the -- I'm sure the SBA is very busy
21 because they're dealing with a number of these lawsuits. But,
22 second, it's not the responsibility of the Defendant to ensure
23 whether or not your client has admissible evidence; that's your
24 responsibility. And as you know, it's pretty straightforward
25 from an evidentiary perspective that if I'm going to admit the

1 declaration of a party, then that declarant has to be available
2 for cross examination. So, again, what's the basis for the
3 admission of the declaration inasmuch as the declarant is not
4 available?

5 **MR. KEIFFER:** Your Honor, I don't know that I have a
6 decent response to that other than I would ask the Court for an
7 opportunity to get Ms. Wexler on the phone.

8 **THE COURT:** Ms. Sinesi, what's your position on that,
9 please?

10 **MS. SINESI:** Your Honor, the nature of temporary
11 restraining orders, you know, is what dictates this unusually
12 fast hearing. Our delayed response, because we are dealing
13 with a number of similar matters throughout the country in
14 large numbers at this point. And I will say that I do not
15 dispute the material fact of the fact that Asteria applied for
16 one of these PPP loans and that it was denied. And that to the
17 extent that there are any factual issues beyond that that are
18 needed for your Honor's consideration of the TRO, this is
19 exactly why we would assert that the TRO should be denied but
20 that a scheduling order be put in place and an opportunity to
21 prepare and cross examine witnesses by deposition in advance of
22 a hearing on a preliminary injunction should be the next course
23 of action.

24 **THE COURT:** All right. But to your point, and I
25 appreciate your recognition that the factual allegations

1 regarding the attempts that Ms. Wexler made about attempting to
2 get a PP loan and what you were told really aren't in dispute;
3 would you agree with that?

4 **MS. SINESI:** Yes, your Honor, I would agree with
5 that.

6 **THE COURT:** All right. So, Mr. Keiffer, what I'll do
7 is I will allow both the -- is it an affidavit or declaration?
8 I'm sorry, I don't have it up on my screen.

9 **MR. KEIFFER:** Declaration, your Honor.

10 **THE COURT:** All right, I'll allow the declaration
11 with the attachments, I'll admit them for the limited purpose
12 of demonstrating the efforts that the Debtor undertook to
13 acquire a PP loan and that it was denied and that the
14 consideration, the sold consideration was that the Debtor was
15 in bankruptcy. I'll do that, all right?

16 **(Declaration with attachments received in evidence)**

17 **MR. KEIFFER:** Thank you, your Honor. But I think it
18 would be just as easy (indisc.) convene in just a short bit and
19 have Ms. Wexler to come on to deal with the other issue
20 regarding the effect of it on the Debtor itself, even though I
21 think the Court has already seen enough information in the case
22 in itself to know what the effect of the COVID-19 has been on
23 this Debtor.

24 **THE COURT:** I think that's correct. Regrettably I
25 can't accommodate your request because I have an emergency

1 matter right after this hearing and several matters this
2 afternoon. And inasmuch as the TRO, there's time of essence,
3 I'd prefer not to do that. But, yes, I'm acutely aware. And
4 you'd have to be in a cave without any outside access to what's
5 going on and what the effect it's had on business. So I'm
6 aware of that. Let me ask you a couple questions if I may.
7 You sort of addressed these but I just want to make sure
8 they're on the record. First of all, with regard to the issue
9 of whether or not I can enjoin the SBA, the opposition details
10 a number of circuit court opinions, including the Fifth
11 Circuit, that say I don't have that authority. And as I
12 understand it, your response to that is I can enjoin the SBA
13 because they've exceeded their authority; is that correct?

14 **MR. KEIFFER:** That is correct.

15 **THE COURT:** All right. Second thing is, under
16 525(a), the way I understand at least how the Fifth Circuit has
17 construed this in other cases I have is that I have to construe
18 525(a) narrowly. And inasmuch as the statutory language does
19 not contain an express reference to "loan," my understanding of
20 your argument is, is that effectively this loan is a grant; is
21 that correct?

22 **MR. KEIFFER:** That is correct, your Honor.

23 **THE COURT:** All right. And then there was one other.
24 Let me check my notes here, sir, so I can make sure there's not
25 anything else that I'm missing. Bear with me for one minute.

1 I took a number of notes about things that you've said. Let's
2 talk briefly for the benefit of Ms. Sinesi, just so she has a
3 little bit of the lay of the land. You would acknowledge as it
4 relates to your prior motion with the Court under 364 of the
5 Bankruptcy Code that you had asked this Court and this Court
6 had approved you obtaining financing through the PPP program
7 and you asked for an indication from this Court that as best
8 the Court can understand at that time, and this was last month
9 I believe it was or earlier this month, that the Debtor's
10 application, that the process, that there was no prohibition as
11 you understood it under the CFR regulations, the interim rules
12 that were implemented at that time, that precluded the Debtor
13 from participating and getting a loan under the PPP program; is
14 that correct?

15 **MR. KEIFFER:** That is correct. We did not find out
16 about the PPP loan application form until after loan
17 applications were actually being reviewed and submitted. And
18 it wasn't until approximately April the 10th did the Debtor
19 find out and counsel find out that there was this specific
20 exclusion in the format.

21 **THE COURT:** All right. And so just from a
22 chronological perspective, you asked the Court to, under the
23 364 requirements, indicating the Court that you had no other
24 access to credit, that you wanted to avail yourself of the PPP
25 program. I approved that and then subsequent to that you were

1 denied. And by the time that this matter was set, when you
2 filed your adversary complaint and requested the TRO, the first
3 tranche of funding had gone out and now we're in the context of
4 the second funding; is that accurate?

5 **MR. KEIFFER:** That is correct. And to get to the
6 point of being in the queue, it is our understanding that
7 people that had already applied didn't get funded would be the
8 ones that would be next in the queue, which brought forth the
9 request saying realistically we should have been in the queue
10 (indisc.) inappropriate and capriciously added standard.

11 **THE COURT:** No, I understand that point. And finally
12 to where we are again chronologically that what has occurred --
13 what has transpired between when you filed your original
14 application for a TRO and filed your amended application is
15 that the SBA, for lack of a better word, promulgated new
16 regulations, they're interim rules, they're not subject to the
17 usual process of being published for comment before they become
18 final, and in those interim regulations, I think it's Rule 4,
19 there's that prohibition against debtors being eligible for the
20 PP loans; is that correct?

21 **MR. KEIFFER:** Yes, your Honor.

22 **THE COURT:** All right, thank you. All right,
23 Ms. Sinesi, I'll hear from you now.

24 **MS. SINESI:** Just checking the time. Yes, it's good
25 morning still, your Honor. I'm ahead of you by an hour since I

1 am calling in from Washington, D.C. And I am very grateful for
2 your Honor's patience and for the quick scheduling of this.
3 This is a very unprecedented time in our country with this
4 pandemic and that it is impacting a number of legal
5 jurisdictions on a number of fronts. So thank you, your Honor,
6 for your time and attention to this matter.

7 This complaint raises challenges to the SBA's
8 implementation and administration of the CARES Act currently
9 funded with \$659 billion. This is unprecedented as Plaintiff's
10 counsel has indicated. And in his complaint, he wants to
11 overturn the SBA's explicit policy of excluding bankrupt
12 entities from participation. The injunction relief that is
13 sought is barred under the concept of sovereign immunity. And
14 for purposes of the record, I would like to state that on this
15 -- on the outset, that the United States does not waive its
16 objection to jurisdiction by the bankruptcy court with respect
17 to this action. We seek to preserve our rights on this issue
18 and are appearing today to argue against the grant of a TRO in
19 this matter. We do not consent to the entry of any final order
20 by this Court and we assert that it does not have
21 constitutional authority to enter it. To the extent that your
22 Honor requires briefs on this, I would ask that we be allowed
23 time to do so.

24 **THE COURT:** All right, I'll --

25 **MS. SINESI:** Regardless of my -- go ahead, your

1 Honor, sorry.

2 **THE COURT:** I'll come back to -- let me just ask you
3 on that point, we'll come back to that to the extent we need
4 to. You would acknowledge that I at least have jurisdiction to
5 make a determination of whether or not a TRO should be granted;
6 do you agree or disagree with that statement?

7 **MS. SINESI:** Not to the extent the TRO is premised on
8 the SBA's authority so not premised on any APA type of
9 argument.

10 **THE COURT:** Please continue.

11 **MS. SINESI:** Thank you, your Honor. Okay, so the
12 three broad prongs of my argument are that injunctive relief is
13 barred under concepts of sovereign immunity, that 11 USC
14 Section 525(a) does not apply to loans or loan guarantees,
15 which is what is at issue today, and that the concepts of APA
16 mandamus failed as the SBA has issued rules addressing the
17 exclusion. Both the CARES Act and the SBA Act explicitly
18 delegates that authority to the administrator.

19 The CARES Act provides, as has already been
20 discussed, unprecedented emergency economic assistance to help
21 individuals and businesses and healthcare providers to cope
22 with the COVID-19 crisis. One portion of the economic
23 assistance is what's at issue this morning, the payroll
24 protection program under Section 1102, which adds paragraph 36
25 to Section 7A. Under interim rules that the administrator has

1 issued, loans for covered uses are added to Section 7A. And
2 these types of loans are itemized as to their purpose. They
3 can be used for payroll costs, interest on mortgage, rent,
4 utilities, and certain other explicitly itemized purposes.
5 Otherwise, Section 7A is unaltered and has the same limitations
6 that it had prior to the CARES Act being put in place. It
7 provides that the SBA may guarantee. It does not say "shall;"
8 it says "may." So that's an important aspect of this that I
9 would ask the Court to keep in mind.

10 Section 636(a)(36)(D) through (R) details the precise
11 way in which the payroll protection program, I'll refer to it
12 as "PPP," covers loans that differs from other 7A loans. It
13 relaxes size limitations, says it's okay to lend to nonprofits,
14 etcetera. And it's selectively waives SBA applications and
15 rules used to -- with respect to small business sizes. But it
16 leaves unaltered the provision that loans shall be of sound
17 value and so secured as to reasonably assure repayment, 15 USC
18 636(a)(6).

19 The first I heard somebody refer to it as tranche,
20 the first amount, allocated to the PPP was \$349 billion. As we
21 are all familiar, that amount of money went very quickly and it
22 has now been replenished with an additional \$310 billion. And
23 it's sometimes referred to as the CARES Act Two. SBA started
24 accepting applications under this second CARES Act Two on April
25 27th, so just a short time ago. The CARES Act authorizes the

1 administrator of SBA to issue emergency regulations to
2 implement the PPP without the usual notice and comment
3 procedures that normally the administrator would go through.

4 The first rule was posted on April 3rd and added to
5 the Federal Register on April 15th, and it allowed for a
6 streamlined process so that lenders did not need to comply with
7 the usual case underwriting requirements. The PPP application
8 requires the borrower to certify that it is not in bankruptcy.
9 And this application was part of this rule. The second interim
10 rule also published on -- passed and also published on the same
11 date of April 28th added some temporary changes related to the
12 PPP with additional eligibility requirements and specifically
13 addresses applicants in bankruptcy. And that's found at 85 CFR
14 20817.

15 The legal standard that the Court is faced with today
16 is asking for a review of an extraordinary and drastic relief.
17 It is -- an injunction is not awarded as a right. It is only
18 awarded if the plaintiff can show a clear showing that it is
19 entitled. It has to show that they're likely to succeed at a -
20 - at hearing. It is that there's irreparable harm, and that
21 the balance of equity is in its favor, and that the injunction
22 is in the public interest. Injunctions that disrupt the status
23 quo are disfavored. And here the status quo is that an
24 applicant is not allowed to apply to and participate in this
25 PPP program. I would ask the Court to remember that Asteria

1 filed for bankruptcy. This is not an involuntary. They chose
2 to be in bankruptcy and it's their actions that have therefore
3 had the consequences of excluding them from participation in
4 this program.

5 **THE COURT:** So if I may, and I'm not going to ask a
6 lot of questions of either one of you all because I want to
7 hear what you have to say, so you're -- are you telling the
8 Court that if Asteria dismissed their Chapter 11 case, if the
9 Court allowed them to do that and reapply, they might be
10 eligible for a loan?

11 **MS. SINESI:** I am not aware of anything that would
12 restrict them from being eligible. The question on the
13 application form is addressed as are you presently in
14 bankruptcy.

15 **THE COURT:** So what you're telling me is but for the
16 fact that they're in bankruptcy right now at this minute,
17 they're not eligible. And I know there's more to your legal
18 argument than that. But specifically if tomorrow Mr. Keiffer
19 said, you know what, we're going to take our chances and go for
20 this financing, they could simply dismiss the case with Court
21 permission and reapply, they might be eligible for these loans.

22 **MS. SINESI:** Your Honor, I am not reviewing these
23 forms but if you go through the eligibility requirements on the
24 form, the question is very specific and it is the question that
25 knocks out Asteria, which is are you presently in bankruptcy.

1 So, yes, I would imagine that the answer is yes. There's not
2 currently a regulation in place that would somehow -- it
3 doesn't ask have you ever been in bankruptcy. It doesn't ask
4 if you've been in bankruptcy within the past seven years. It
5 asks -- it was a very limited provision in terms of eligibility
6 that was placed into this form because they were trying to
7 streamline the process --

8 **THE COURT:** Please continue.

9 **MS. SINESI:** -- and get the money rolling. Let's
10 see. I'm sorry, your Honor, I lost my place.

11 **THE COURT:** We're talking about the elements for a
12 TRO, that the injunction disrupts the status quo, and that's
13 when I asked you a question.

14 **MS. SINESI:** Thank you for your forbearance. Okay,
15 so the Small Business Act does not contain a waiver of
16 sovereign immunity and -- but it is limited, as has been
17 discussed by my opposing counsel here. The SBA statute
18 effectively precludes injunctive relief against the
19 administrator.

20 **THE COURT:** Does that apply even when it's --

21 **MS. SINESI:** And I --

22 **THE COURT:** I'm sorry, and I -- last time I'll try.
23 On that point, does that apply even if I think that the
24 administrator's acts are arbitrary and capricious?

25 **MS. SINESI:** Your Honor, I would assert that, yes,

1 the -- this Court -- at this level, the bankruptcy court does
2 not have authority because the plain language of the Small
3 Business Act, the waiver of immunity is to district courts. It
4 is not to all Federal Courts, it is simply to district courts
5 and above. So that is the primary basis for why we are
6 asserting that this Court does not have the authority over the
7 SBA to enjoin the SBA on this point.

8 The Section 525(a) argument does not apply to loans.
9 That's been discussed at length in my brief. It is plain
10 language it -- this reading of Section 525(a) is very explicit
11 and does not include the use of the term "grant." Grant has
12 been the argument that the Debtor has relied on, that this is
13 in the nature of a grant. Congress, when it wrote this -- the
14 CARES Act, is fully aware of the difference between a grant and
15 a loan. And this program provided for a guarantee by the SBA,
16 not a direct loan, a guarantee of loans by community and
17 national level banks. As a result, we do not feel that there -
18 - that 525(a) applies. Section 525(a) is very specific. And
19 the PPP program I think acknowledges the fact that while the
20 funds are advanced for a specific purpose, and that if they are
21 used for that specific purpose, that there would be a
22 forgiveness of collection of the debt. It also encompasses
23 that and realizes that an applicant might not use the funds as
24 itemized under the Payroll Protection Act, and that in that
25 event it has to be repaid. So the waiver portion, the

1 forgiveness of debt portion rather is very limited and clear by
2 Congress. This is a loan under this program and it is a loan
3 by banks that is guaranteed by the SBA. And that is not in any
4 way encompassed within 525(a). This is not a right, this is
5 not a license, this is not a permit. It's not put in place as
6 a guaranteed program. It is not similar to the checks that
7 individuals were to receive under different portions of the
8 CARES Act that, you know, were direct receipt of payments.
9 This is completely different. You do still have to apply,
10 there's a specific amount of money that is available, and only
11 if the funds are used in a very specific, limited way would
12 there be a forgiveness of that debt. And very clearly if it is
13 not used in that way, it must be repaid. Now, yes, it is
14 repaid under very generous terms but it must be repaid. So,
15 no, this is not a grant, this is not a giveaway, this is not
16 free money from the government.

17 And I would draw your Honor's attention to we cited
18 quite a few cases on this point but the preeminent case on this
19 point is *Toth versus Michigan State Housing Development*
20 *Authority*, 136 F.3d 477; 525 does not apply to state-issued
21 home improvement loans. And I would say that this is a very
22 similar type of concept.

23 The PPP does not provide a right. It is noteworthy
24 that entities in bankruptcy may be eligible for other relief
25 under the CARES Act. And there are similar programs such as

1 the emergency EIDL grant under the CARES Act. Congress was
2 very thoughtful in how they put together the CARES Act and how
3 they wanted to very quickly bring these types of programs to
4 availability to individuals and businesses.

5 With respect to APA claims, the United States may not
6 be sued without its consent. Sovereign immunity waivers are
7 forum-specific, and waivers of sovereign immunity are strictly
8 construed. The United States can waive immunity of process and
9 it has not in this case with respect to the SBA. Challenges to
10 SBA authority do not in any way manifest before the Bankruptcy
11 Court as an appropriate forum. That should be in the district
12 court and above. The Plaintiff has pointed to the limited
13 waiver of immunity clause in the SBA. But as I pointed out to
14 the Court earlier, this applies only to district court and it
15 does not include the bankruptcy court. Congress was well aware
16 of how to make a broader waiver and has done so in other
17 statutes, such as the Fannie Mae waiver found in 12 USC,
18 Section 723(a), where there's a waiver of sovereign immunity
19 for any court of competent jurisdiction. That is not the type
20 of waiver that we are dealing with here.

21 The CARES Act is silent on bankruptcy eligibility.
22 And here Plaintiff's counsel wants us to substitute his opinion
23 and that of similarly situated debtors before Congress. Silent
24 does not mean that any of the provisions that are otherwise
25 applicable outside of the CARES Act under 7A should simply be

1 ignored. Section 17(a) requirement under 15 USC, Section 636
2 still stands, that loans shall be of sound value and to assure
3 that repayment is made. It has been completely untouched by
4 the CARES Act. The SBA administrator is explicitly empowered
5 to make sure that such rules as are necessary to enforce the
6 provisions of the SBA Act and the CARES Act are made. And she
7 did issue rules on these points. As is referenced in my brief
8 and was touched on briefly by Plaintiff, the first interim rule
9 explicitly incorporates the PPP application and the bankruptcy
10 exclusion on that form. And the fourth interim rule further
11 addresses the ineligibility of entities in bankruptcy with
12 policy rationale. So the fact that the Plaintiff is arguing
13 that SBA was capricious or arbitrary I think is completely
14 refuted by the very explicit and narrowly enacted regulations
15 that have been put in place. Only applicants that are
16 presently insolvent have been deemed to be an unacceptably high
17 risk under this program. Again, I would point your Honor to
18 the fact that the usual underwriting requirements were
19 eliminated because under this program. So having one very
20 narrow element that is a restriction is not capricious nor is
21 it unreasonable.

22 A bankruptcy petition does establish a baseline of
23 insolvency on behalf of whoever it is that's in bankruptcy, in
24 case this Asteria Education. Asteria Education is based on
25 information --

1 **THE COURT:** But, Ms. Sinesi, --

2 **MS. SINESI:** -- that's in its filing --

3 **THE COURT:** Ms. Sinesi.

4 **MS. SINESI:** Yes, your Honor.

5 **THE COURT:** I am terribly sorry to ask you, but could
6 you hold that train of thought for like five minutes?

7 **MS. SINESI:** Sure.

8 **THE COURT:** I need to step away, if you catch my
9 drift. And --

10 **MS. SINESI:** Yes.

11 **THE COURT:** -- we'll continue. You can have -- I
12 have a matter at 11:30 but if we go beyond that, that's
13 perfectly fine because, you know, I intend to rule this
14 morning. But I need like five minutes if we could, please.

15 **MS. SINESI:** Yeah, I'm almost at the end, your Honor.

16 **THE COURT:** If you'll bear with me, I'll come back
17 and then you'll finish up and I'll have some questions for you.
18 And then I'll let Mr. Keiffer respond, okay? So short --

19 **MS. SINESI:** Yes, your Honor.

20 **THE COURT:** -- recess, thank you.

21 **(Recess taken from 11:00 a.m. to 11:05 a.m.)**

22 **THE COURT:** Judge Gargotta. We're back on the
23 record.

24 My apologies to you, Ms. Sinesi, that we had to stop.
25 We were talking about why the arbitrary and capricious standard

1 didn't apply, and my last note says because the rule addresses
2 this, and I assume you're referring to interim rule four. Is
3 that correct?

4 **MS. SINESI:** Yes, your Honor. That is correct.

5 **THE COURT:** Go ahead, please.

6 **MS. SINESI:** I wanted to draw the Court's attention
7 to the fact that -- and I don't know why there's an echo.

8 **THE COURT:** I don't know either. You're coming in on
9 our end perfectly.

10 **MS. SINESI:** Okay. Asteria -- the nature of
11 Asteria's business, according to the declaration that was filed
12 at the time that the petition was lodged with the Court, is
13 that it develops software to digital platform with contents --
14 contents and materials for teachers and tutors with respect to,
15 among other things, SAT performance, maximizing students' SAT
16 performance. This is the type of business that is ideally able
17 to transition to a remote learning platform, which is what we
18 are facing as a society right now. There are some businesses
19 that it's very difficult to make the transition to continue
20 operations remotely. But a software company, a developer of
21 software, etcetera, educators seem to be making that
22 transition. While with difficulty, I would acknowledge,
23 they're still able to make the transition better than, say, a
24 barber. And, you know, and given that situation, the fact that
25 Asteria is making the assertion that it will be harmed,

1 irreparably harmed, if it does not get this loan, I do not feel
2 that it has met the standard or presented sufficient evidence
3 in support of that assertion.

4 There are -- they are still able to operate because
5 it's a digital platform, by their own statements made in this
6 case, I'm sure with alterations to their business, but they are
7 still able to operate. They have not presented any evidence --
8 it's all been, basically, speculative that -- although they do
9 acknowledge somewhere in their complaint that there is a
10 natural dip in its business over the summer months, since it's
11 an SAT prep business. And since I have two children that have
12 gone through the process, I'm sure that the summer is the sigh
13 of relief time from parents and students alike, and then it
14 starts ginning up more work and pressure on these students as
15 they prepare during the school year prior to college
16 applications. That can be done remotely, and there are various
17 platforms that are remote. So, while I'm sure that there is an
18 adjustment that this company needs to make because of the
19 current pandemic, it's possible to make that adjustment, and
20 they have not put forth any evidence or information before this
21 Court to indicate why they could not do that.

22 Further, it is my understanding that in Texas that
23 the stay-at-home, shelter-in-place orders will start to be
24 relaxed in early May. There has been no testimony or
25 information presented as to how that might benefit or be

1 negative to the business. Essentially, I would argue that
2 there is just insufficient evidence on the irreparable harm
3 portion that the plaintiff has to prove in order to prevail
4 before the Court this morning.

5 I would also like to point out the fact that if you
6 assume for one moment that it would be appropriate for this
7 debtor to get a PPP loan, there have been no assurances offered
8 or made to the SBA that would provide adequate protection.
9 We've (indisc.) -- no ways in which SBA has been offered post-
10 petition security in any way. And bankruptcy is an unusual
11 situation that is outside the norm of lending, which is why
12 they just removed it from consideration under this exigent
13 program that is in place.

14 **THE COURT:** Interrupt you on that point.

15 **MS. SINESI:** Um --

16 **THE COURT:** May I interrupt you on that point,
17 please?

18 **MS. SINESI:** Yes, your Honor.

19 **THE COURT:** I'm a little confused by that statement,
20 because, as we understand the program works, there is no need
21 for collateral or assurance of repayment as long as the monies
22 are allocated for such things as payroll, rent, things of that
23 nature. So, what would be the SBA's -- let's assume -- we're
24 in the bankruptcy context. What could the SBA assert that
25 they're entitled to in terms of cash collateral protections if

1 the whole premise to the program is, is to give the money
2 essentially unencumbered? I don't quite follow your argument
3 on that.

4 **MS. SINESI:** Well, they could be entitled to some
5 kind of administrative status. And it's exactly the point that
6 I very, obviously, inartfully made. This is silent. This act
7 is silent on this point, and yet there is an impact because
8 this debtor is in bankruptcy and asking for this loan when
9 normally, if there was a loan made post-petition to a debtor,
10 they would be -- that lender would be entitled to various
11 protections under the Bankruptcy Code. And, in this case, SBA
12 is one step removed as a guarantor. It's the fact that this
13 act is silent -- Congress is silent, excuse me, on this point,
14 and yet the debtor wants this loan to be made, and there's no
15 discussion of how that would be done in this act in terms of
16 this bankruptcy impact. To me, it supports SBA's point of why
17 this is a reasonable and non-capricious exclusion.

18 **THE COURT:** All right. So, let me follow up that
19 point with you, because this is a question that I'll ask
20 Mr. Keiffer to address when I give him a chance to briefly
21 respond. You may or may not be aware that the whole premise of
22 this case was, prior to the pandemic reaching its severity, was
23 that the debtor intended to sell its business. And, so -- and
24 was going to market it through a broker and attempt to sell it
25 to a third party. And, of course, what interrupted this was

1 the fact that COVID-19 happened, and the debtor needs
2 financing, as represented to this Court, for things as I
3 pointed out, payroll and things of that nature.

4 So, let's assume that, number one, I grant the TRO
5 and ultimately the debtor is awarded this money under the PPP
6 program, and, second, the debtor is sold to a third party.
7 What happens? Is there any remaining obli- --if the debtor
8 does everything it says it's going to do, follows the program
9 to a tee, but, nonetheless, the debtor is sold to a third
10 party, what's the effect of that when a third party takes over
11 as it relates to the obligations that were extinguished because
12 the debtor used the money as intended? Does it matter or not?

13 **MS. SINESI:** Um -- well, first, it's presuming that
14 the money will be spent as itemized. Clearly, the PPP program
15 realizes that it cannot control how the money is spent. It can
16 simply say, if you spend it on these six items and can prove
17 that you spent it on these six items, then there is no
18 obligation for repayment. However, if you don't, then we'll
19 give you some time period of forbearance and a reduced interest
20 rate and you must repay it.

21 And this is just a -- again, it's one step removed.
22 It's a guarantee by SBA. It is not the direct loan by the
23 lender. So, you know, there is an impact being made here on
24 two parties, the financial institution as well as SBA, in terms
25 of the outcome of collection, if there's any necessary

1 collection, at the conclusion of a case.

2 And I'm assuming your Honor is referring to, you
3 know, a sale that would be free and clear to a third party with
4 appropriate notice under the Bankruptcy Code and would,
5 therefore, be -- you know, one of the things that the SBA would
6 require, obviously, in that scenario in order to not object to
7 such a sale is that the purchaser step into the shoes of the
8 debtor in terms of any obligations on this guarantee and loan.

9 **THE COURT:** All right. It -- and --

10 **MS. SINESI:** But it's the -- it's the very uncertain
11 nature of this. You know, once we hand them the money, once
12 the bank hands them the money, we don't know that they're going
13 to spend it appropriately, and clearly Congress realized that.
14 That's how they -- that's why they phrased it the way they did.

15 **THE COURT:** Help you out on that. I really don't buy
16 that point because I think the advantage -- and I think Judge
17 Jones acknowledged this -- is that a bankruptcy court can
18 supervise what a debtor does and does not do with its cash
19 collateral. I mean, there could be -- obviously, there's going
20 to be monthly operating reports that are going to be filed with
21 the Court. The Court could easily mandate some sort of
22 accounting, if you will, from the debtor that details how the
23 money is spent. So, while I understand your argument, I think
24 actually it's the opposite. In the bankruptcy context there is
25 more supervision, whether it be from the Court, the creditor

1 constituency, or even the U.S. Trustee's office. So, I
2 appreciate your argument, but it's not one I'm going to buy, so
3 why don't you move on to your next point.

4 **MS. SINESI:** All right, your Honor. Thank you. Bear
5 with me one second.

6 **(Pause)**

7 **MS. SINESI:** The mechanism for the Payroll Protection
8 Program has been automated and set up in such a way to speed
9 funds to applicants. And one of the concerns that was raised
10 in our brief and that I would draw your Honor's attention to is
11 unexpected complications and consequences from variation of
12 this process. It's very difficult to pull out and reserve and
13 replace this applicant's end line (indisc.) when funds -- when
14 there is a limited pool of money and it's been disbursed, and
15 when there has not been an adequate showing from this debtor
16 that there is no other way for them to get a loan, there is no
17 other way for them to reorganize this business, and there is no
18 other way for them to proceed. There has not been an adequate
19 showing by this debtor of irreparable harm.

20 Let's see. That's really all I had, your Honor.

21 **THE COURT:** All right. I have a couple follow-up
22 questions before I let Mr. Keiffer -- so, let's -- let's talk
23 about jurisdiction. One of the things I've always remarked is
24 district courts -- the first thing a district court always
25 looks at is whether or not it has jurisdiction over a

1 particular matter before it and is not reticent in making a
2 finding that it does not. Bankruptcy courts have a tendency
3 that they'll look to have jurisdiction wherever they can find
4 it. So, let's talk briefly about this.

5 As I understand it, you would agree that this is not
6 a matter arising under or arising in under the Bankruptcy Code.
7 Would you agree with that statement?

8 **MS. SINESI:** Yes.

9 **THE COURT:** So, at best, it's related to. So, it's
10 related to. Would you agree, at least initially, that this is
11 a related-to the bankruptcy -- the main bankruptcy case, that
12 is has a relationship in that regard? Would you agree or
13 disagree with that?

14 **MS. SINESI:** Your Honor, I'm not authorized to
15 concede that that would be our position. In fact, I would ask
16 that we could brief that point, because we do not believe it is
17 related to, but -- I mean, but for the argument being made that
18 the administrator exceeded her authority and was arbitrary and
19 capricious, this matter would not arise before your Honor.

20 **THE COURT:** Thank you. And, so, you sort of answered
21 my question. So, would the -- and, look, we're on very, very
22 tight timelines. But would the appropriate way to have dealt
23 with that would have been to withdraw the reference on this?

24 **MS. SINESI:** Um, yeah, that would be one approach,
25 your Honor. Yeah, absolutely, that would be one approach.

1 **THE COURT:** I know you don't know me from Adam. I'm
2 not offended when someone tells me I don't have jurisdiction
3 over a particular matter. I understand that it's part and
4 parcel of the process. So, you don't need to be apologetic
5 about the position you're taking.

6 So, as I understand it from a jurisdictional
7 perspective, you're not certain that we have related-to
8 jurisdiction, and absent the Court finding that it has some way
9 to have jurisdiction, as you understand the applicable statutes
10 and case law, that this is a matter that really should be
11 decided by an Article III court. Is that correct?

12 **MS. SINESI:** That is correct.

13 **THE COURT:** All right. So, if you can tell me, we
14 have tried to be mindful of what other courts are doing.
15 Again, as I indicated at the beginning of the hearing, I know
16 that there is a matter pending in the Arizona bankruptcy court
17 that they've continued, I think, the briefing on that, and that
18 there is a matter in the district court, in the Western
19 District of New York, where there is a related bankruptcy, and
20 I think they have asked the district court to rule on this. I
21 also, as I indicated, know about Judge Jones and his decision
22 recently in the Southern District in the bankruptcy court
23 there.

24 Have other courts dealt with this, to your knowledge,
25 and how have they ruled?

1 **MS. SINESI:** Your Honor, this is changing hourly and
2 daily, but there have been courts that have declined to issue
3 TROs. Just in the times that this hearing has been taking
4 place, I've had 54 notifications of things changing throughout
5 the country. So, this is a very fluid situation, but there
6 have been decisions made denying TROs, I can say to the Court.

7 **THE COURT:** And I won't ask for a percentage basis,
8 because it really doesn't matter. I'm just trying to get a
9 sense of things. I'm going to make my own independent
10 determination. But, if you can -- and if you can't, that's
11 fine; I can have an appreciation of the -- are you handling
12 these matters? Are you sort of on the forefront of all this?

13 **MS. SINESI:** We have a team of attorneys that are
14 handling these, and these are coming up in states and
15 territories throughout the country. So, this is a very hot and
16 fluid situation. So, I apologize that I cannot bring you up to
17 date, but literally between yesterday and today things have
18 changed. I can say that to the Court.

19 **THE COURT:** Do you have a sense, of those courts that
20 have declined to issue a TRO, what their reasoning, just in
21 summary form, is?

22 **MS. SINESI:** A failure to show irreparable harm, lack
23 of jurisdiction by the Court. Those are the two prongs that
24 I'm aware of. Again, I'm scanning emails literally as I'm
25 sitting here and trying not to read them, because I'm trying to

1 focus on this argument. It's literally changing as we speak --

2 **THE COURT:** That's fine.

3 **MS. SINESI:** -- you know, in terms of input of
4 information. I wish I could be more specific, but this is a
5 very fluid situation.

6 **THE COURT:** I can have an appreciation for the
7 magnitude of what you're dealing with.

8 So, let -- now, let me circle back to, just in real
9 terms, what we're dealing with. You may have not had the
10 chance to read Judge David Jones' ruling in the *Hidalgo* case,
11 and -- and Judge Jones spent a great deal of time, and it
12 seemed evident to me, just based upon the print on the paper,
13 that he was deeply concerned about how this would adversely
14 affect debtors in bankruptcy and the harm that would be visited
15 on him, and he made it -- he made this point at great length
16 repeatedly in the transcript, which I have read -- I had read
17 prior to Mr. Keiffer so graciously providing it -- that this
18 could not be what Congress intended, that it would -- it would
19 allow lending to non-debtor entities and allow them to go
20 through the process and preserve their business but would not
21 extend the same possibility to debtors in bankruptcy. So, the
22 debtors in bankruptcy are adversely impacted by the
23 administrator's decision.

24 As a judge sitting here that's going to have to make
25 this determination, is it just a matter of law? Is there no

1 equity in this, or is there any equity that I can consider?

2 **MS. SINESI:** I am familiar with the *Hidalgo*
3 situation, and I do have the transcript in front of me, and as
4 a -- prior to your Honor being on the bench, long term
5 attorney, you know that there are decisions that you agree with
6 and decisions you don't agree with based on the law. Congress
7 did not discuss this point. Congress is silent on this point.
8 It is up to Congress to -- should they choose to resolve this.
9 It is not -- it is our position that it is not for the courts
10 to resolve this. Congress could have been very explicit and
11 stated that the Payroll Protection Program should be extended
12 to Chapter 11 debtors. It did not. Instead, it left it to the
13 SBA administrator, and I've already explained at length the
14 process that she went through and why we do not feel that it is
15 arbitrary or capricious. It is very narrow, and, yes, it's
16 impacting Chapter 11 debtors. I understand your Honor's
17 concern. I understand the concern that Judge Jones has.

18 I would point to the fact that you do have a
19 different set of facts in terms of the irreparable harm. You
20 do -- Hidalgo County Emergency Service Foundation -- I think
21 that was EMTs -- that's not something that can be transitioned
22 to a online, social-distancing type of platform, which is a
23 very different type of business over and above what this debtor
24 does. So, I do think your Honor needs to take the facts of the
25 case into consideration, along with what Congress intended or

1 didn't intend.

2 **THE COURT:** All right. Thank you.

3 Before, Mr. Keiffer, I turn to you for a response,
4 let me note on the record that it's 11:26. I set on an
5 emergency basis the Lone Star Brewery matter at 11:30. I can
6 tell the parties that we're not going to be done by 11:30, so
7 you're going to need to be patient. It's critical for my
8 benefit and the parties here on the Asteria matter that you
9 mute your phones.

10 I don't anticipate that I'm going to get to you all
11 any sooner than -- and this is very optimistic -- quarter to
12 12, if not 12:00 o'clock, so you just may want to stand down.
13 If you have the luxury of being in your office and can grab a
14 sandwich, I would encourage you to do that. But I want to make
15 sure that the parties in Asteria are fully vetted on the issues
16 and their arguments.

17 So, go ahead, Mr. Keiffer. A laser-like, if you
18 will, response to what the Court has heard.

19 **(Pause)**

20 **THE COURT:** Go ahead, Mr. Keiffer.

21 **MR. KEIFFER:** Had to take it off mute.

22 **THE COURT:** Go ahead, sir.

23 **MR. KEIFFER:** I'd like to note, your Honor, that
24 Ms. Wexler is on the line if there is any reason for any cross
25 examination.

1 **THE COURT:** Okay.

2 **MR. KEIFFER:** She has a very short window, as well,
3 but if counsel needs to ask any questions, I think it was
4 merely a technicality; she is available. I don't think there
5 is going to be anything about the declarant's statement and her
6 declaration that are really at issue, that there's really any
7 real concern about what she has said about what her position is
8 on the facts and the circumstances in regard to the debtor.

9 **THE COURT:** Go ahead.

10 **MR. KEIFFER:** I just want to make note of that --

11 **THE COURT:** Thank you.

12 **MR. KEIFFER:** -- that she is available. At this very
13 minute she is on line. She's on the phone.

14 **THE COURT:** Go ahead, Mr. Keiffer.

15 **MR. KEIFFER:** I want to comment regarding the
16 following. The case underwriting requirements were not changed
17 by the SBA. It was done by Congress. The SBA has been told to
18 implement this act. It didn't implement this act; it added to
19 this act. It discriminated against small business debtors when
20 Congress expressly made decisions that bankruptcy or insolvency
21 would be a problem for midsize and large corporations and
22 entities. It made by doing that, in that same statute, in that
23 same circumstance where it made all of these provisions and
24 changes, that lack of statement of the bankruptcy being a bar,
25 is telling beyond measure. It is not a normal circumstance

1 where you have to look for some sort of relationship between
2 one act and another act and there is no mention of bankruptcy
3 when you're trying to expand into the realm of what bankruptcy
4 can do, an ability to -- that somehow this is applicable. But
5 this act is not like any of the other acts we've been dealing
6 with.

7 None of these other acts that you look through,
8 throughout those cases that they talked about, were at the same
9 time, in the same bill; provisions regarding bankruptcy,
10 bankruptcy debtors that are individuals, bankruptcy debtors
11 with small business, bankruptcy debtors -- what counts as
12 income, all of these type of things were in the act. There
13 were prohibitions in the act for midsized businesses. There
14 were prohibitions regarding solvency in the act regarding large
15 corporations. There are none regarding small. It stretches
16 credulity to say that this is the SBA doing this. The Congress
17 said, here's what you need to do, go implement it, don't add to
18 it.

19 "Involved in any bankruptcy" is not a streamline --
20 streamlining function. It is actually, just on its very face,
21 a hugely expansive, poorly written statement. What does
22 involved in any bankruptcy mean? Proof of claim? Debtor in
23 possession -- (indisc.) in a executory contract? A landlord
24 who happens to have a client -- I mean has a tenant that's in
25 bankruptcy, who has to go protect their rights?

1 "Must be repaid" is a hollow statement here. Quite
2 hollow. That restaurants, that education service, all those
3 other folks that are outside bankruptcy, all of the entities
4 (indisc.) unsecured (indisc.) entities without any funds, the
5 SBA on the loan guarantee must pay. That is because lenders
6 never would have done this. This is a mechanism, not based
7 upon the fact that the SBA guaranteed (indisc.) lending. It's
8 because the SBA, and because of our government structure, is
9 not large enough to cope with all of these -- with this
10 pandemic. The SBA is doing the guarantee function because if
11 they (indisc.) then utilize this huge network that is out there
12 (indisc.). And they understandingly can use that huge network
13 to be able to get funds out to small businesses. It made no
14 provision that, oh, by the way, you should stop with this
15 Chapter 11 debtor that comes your way, or you should stop
16 anybody who happens to have an ownership interest that happens
17 to be in a bankruptcy context. None of that was stated. Not
18 in the act, nor in the (indisc.) senate. Nothing. But it is
19 bankruptcy is the only (indisc.) who can't get this grant.

20 As far as the loosening of things out there,
21 ostensibly loosening things, a dangerous thing to play with
22 here. No schools are being reopened. Thankfully. No schools
23 are being reopened. They will be closed for the rest of this
24 year.

25 Again, bankruptcy, if you (indisc.) Congress, this is

1 not a cash collateral type circumstance. Look at the
2 circumstance if the money comes in. Let's just make an
3 assumption that it comes in. This money will come in as -- not
4 as cash collateral. It will come in with no -- with
5 statutorily no capacity to get to anything that's out there.
6 There is no existing provisions in this about what (indisc.)
7 becoming the bank's collateral necessarily. All that is, is
8 it's a fund for the estate to be utilized for this purpose.
9 Moreover, the bank has no real benefit in doing this. It wants
10 to have the debtor be able to get this to pay these things up,
11 to get the grant qualifications, to move forward in this case.
12 I think that was -- I think that's not -- not really a concern
13 in those circumstances. If all of those elements stopped the
14 normal lending practice, any issues about protecting the SBA
15 now leaves, it isn't getting any of it out there for the
16 general public. The entities that are filing that are using it
17 will -- many, many will surely (indisc.). Many, many surely
18 will never be able to repay. Well, they've gotten an
19 opportunity. Bankruptcy debtors in Chapter 11, nope, you don't
20 get a chance, just because you're in Chapter 11. The (indisc.)
21 doesn't matter that there are regulations regarding
22 circumstances on a sale in regard to a loan that that party may
23 take over that. Fine. I'm sure that's something that could be
24 negotiated in that circumstance (indisc.) to deny. The
25 (indisc.) is an arbitrary and capricious act by the (indisc.)

1 secretary or the administrator to add provisions into this act
2 by regulations that do not exist and are contrary to explicit
3 intent.

4 Your Honor, again, I offer Galina Wexler's affidavit,
5 declaration. She is present. I offer it into evidence for all
6 of its purposes. Moreover, the SBA has cited from various
7 elements of her declaration, as well as the declaration of
8 David Cumberbatch in the case. So, I think some of those
9 points have been raised. Your Honor, I'll ask for admission of
10 Ms. Wexler's declaration. I realize the Court has a lot on its
11 plate. I hate hearing the fact that Lone Star Beer is up next.
12 Sorry to hear about that, but I hope that they are able to
13 maintain.

14 Thank you, your Honor.

15 **THE COURT:** They were bought out by Pabst many years
16 ago, and it's been a non-functioning plant. The intention is
17 to sell it and for redevelopment, but I don't want to comment
18 further.

19 So, Ms. Sinesi, do you wish to examine Ms. Wexler on
20 any points in her affidavit? Or declaration, excuse me.

21 **MS. SINESI:** No, your Honor.

22 **THE COURT:** All right. So --

23 **MS. SINESI:** No, your Honor. Not at this time.

24 **THE COURT:** Thank you.

25 So, I think it's important, Mr. Keiffer, before I

1 rule, walk me through the four elements that you need to meet
2 that entitle you to TRO, and explain to me very briefly why you
3 think you've met your burden on each one. So, go through it
4 for me, please.

5 **MR. KEIFFER:** Hold on a second, your Honor, and I'll
6 get an applicable recitation of it in front of me.

7 **THE COURT:** That's fine.

8 **MR. KEIFFER:** And, by the way, was the declaration
9 admitted, nevertheless? While I'm looking?

10 **(Pause)**

11 **MR. KEIFFER:** Here we go.

12 Debtor is likely to succeed on the merits. (indisc.)
13 the grant, it is structured this way so that the money can be
14 sent out to the public to qualified parties with virtually no
15 qualifications (indisc.), none of them being commercially
16 required. This is an -- this is where the certificate, the
17 administrator exceeded her authority and acted in an arbitrary
18 and capricious manner.

19 Likely to suffer irreparable injury in the absence of
20 preliminary relief. There will be no CARES Act funds available
21 if we go 10, 15 days from now. There will be none. The debtor
22 will, in effect, be left out there without this opportunity to
23 be like every -- the remainder of the other small businesses in
24 the United States. That irreparable harm is a likely to
25 suffer. It isn't that I'll have to prove that we have

1 suffered; it is that I am likely to suffer. And the
2 circumstance of not having \$700,000 when we're already in a
3 situation where we're cutting and furloughing more people
4 coming May, if not the end of May, and then cutting more people
5 in June and July, and having a significant loss in this regard,
6 there is no other methodology. There is nothing else out here
7 than this program, this grant program, that the debtors are
8 being denied the opportunity to participate in.

9 As far as balance of the equities tipping in the
10 debtor's favor, clearly, the SBA here is acting beyond its
11 capacity and beyond -- in an arbitrary and capricious manner.
12 That alone has a significant impact upon the equities. We can
13 go through ostensible rationales one way or the other, but that
14 gives to the SBA something that it doesn't deserve here, and
15 that is the credence that this was done within the confines of
16 the statutes. It's outside the confines of the statutes, they
17 weren't authorized to do this, those reserved elements that
18 have been (indisc.) from sound policy are hollow. They have
19 nothing there.

20 And in the public interest. In this instance, the
21 public interest is served by virtue of this specific debtor --
22 we're not asking for anything more than this specific debtor --
23 having an ability to continue its education program. There is
24 a mischaracterization as to the nature of this debtor. It has
25 facilities. It has a print shop. It has other things. It

1 supplies printed materials. It contracts with other people to
2 supply printed materials. We have not, but for the fact of our
3 weak and sad funding of public education, had ourselves
4 converted to map an easy internet world. There is still paper
5 out there. And these folks are involved in that element, and
6 they need to have the ability to take care of those things and
7 (indisc.) that out. It is a lot of adjustments to be made, but
8 the debtor is prohibited from doing that.

9 In this context, the public interest is that the SBA
10 follows the rule -- what Congress told it to do and not add in
11 new things. It did not get a carte blanche to go in and start
12 adding provisions contrary to the lack of credit requirements
13 that exist in the act. And the repayment circumstances here,
14 without any recourse to human beings whatsoever, means that
15 this is known by Congress to likely engender a significant
16 amount of non-repayment and that that sound policy is merely
17 something -- a vestige from a past circumstance and not
18 something that is here dealing with functionally attaining and
19 pump into the economy.

20 Thank you, your Honor.

21 **THE COURT:** All right. Thank you.

22 All right. I'm going to rule from the bench. A
23 couple things before I rule.

24 Obviously, it's not lost on me or any other citizen
25 the difficult times we live in and how the pandemic has

1 affected our daily lives, the tremendous loss of jobs, people's
2 concerns daily about their ability to make -- pay rent, pay
3 their mortgage, pay their car bill, pay their utilities,
4 children are unable to go to school. We are in unique times,
5 and I acknowledge that as an initial matter.

6 Let me first deal sort of with some of the elements
7 that I need to deal with. As you know, I have subject matter
8 jurisdiction under 28 U.S.C. Section 1334. This matter has
9 been referred to me under the district court's order of
10 reference. Having said that, though, I do agree with the SBA
11 that this is a non-core matter. At best, this is related to.
12 I'll come back to that in just a minute, as that affects the
13 Court's ability to issue -- first of all, to have jurisdiction
14 over this matter, and then, secondarily, the aspect of whether
15 or not I can issue a final order.

16 Venue is proper. There is no dispute about that. I
17 have considered in full. I will admit the declaration in full
18 of Ms. Wexler and the accompanying exhibits.

19 **(Declaration of Ms. Wexler and accompanying exhibits were**
20 **received in evidence)**

21 **THE COURT:** What that evidence tells the Court, that
22 this debtor did everything this debtor could have done with
23 regard to applying for a loan under the PPP program, they made
24 the requisite applications, and the evidence is unequivocally
25 clear that the reason why that they were denied was because of

1 the fact that they're in bankruptcy. So, factually, there is
2 really not much in dispute as it relates to this case, and I
3 don't think there is little doubt -- I don't think the SBA
4 challenges the fact that the reason why this debtor was
5 precluded from participating and potentially receiving a loan
6 was because of their status as a Chapter 11 debtor. So,
7 factually, that's where we are.

8 So, the question is, legally, where are we? And when
9 I came in this morning -- and you actually touched upon this,
10 Ms. Sinesi. My law clerk said to me, "I'm glad I'm not you
11 today, and you have to make these kind of decisions." But that
12 comes with the robe, and it's not a question of popularity;
13 it's a question of following the law. So, let's begin with the
14 law, because the law dictates what I should do.

15 The case law is very consistent in this area about
16 whether or not the administrator can be enjoined. And the
17 circuit law on this, including the Fifth Circuit, is abundantly
18 clear. Generally, a Court does not have the jurisdiction to
19 enjoin the SBA administrator. That's not really in dispute.
20 Notwithstanding the very difficult circumstances we're in, I'm
21 bound by what the Fifth Circuit says, and the Fifth Circuit --
22 and there is a case cited to this effect -- has made it
23 abundantly clear whether or not I have the authority to enjoin
24 the SBA, and I don't.

25 So, now we step to the issue, well, was the SBA

1 administrator's actions as it related to the implementation and
2 application of the PPP program arbitrary and capricious. As
3 you all know -- I should note, as an initial matter, that I
4 have to give what's referred to as "Chevron deference" to what
5 the administrator does. In other words, that I have to give a
6 fair amount of deference to how the administrator administers
7 the regulations and the statutes regarding the SBA program.
8 And, as Ms. Sinesi correctly pointed out, while this is a new
9 version, if you will, of SBA lending, it still comes under 7
10 section (a) of the act, and so those limitations and the
11 considerations that the administrator has in implementing this
12 program are still the governing statute, notwithstanding the
13 implementation of the CARES Act.

14 So, as an initial matter, it's a very difficult
15 burden for a debtor in this instance to overcome the fact that
16 there is case law out there, including the Fifth Circuit, that
17 clearly states that I don't have the authority, as an Article I
18 judge, to enjoin the SBA. But moving beyond that, the
19 corollary to that is, well, did the administrator act
20 arbitrarily and capriciously. And, as I indicated, under the
21 Supreme Court's decision in *Chevron*, I have to give a great
22 deal of deference to what -- the administrator's actions in
23 this regard.

24 So, let's talk about chronology and to the
25 implementing regulations and how I should construe those. I

1 was careful to point out on the record with regard to
2 Mr. Keiffer, you know, the chronology of events. Mr. Keiffer
3 approached the Court back in March and said: We're going to
4 need, essentially -- my words -- a bridge loan to get the
5 debtor from where it is now to where it can effectuate a sale
6 given the fact that we're not going to have a need for STAAR
7 education because the schools are closed and, as he correctly
8 pointed out, the STAAR program is not going to be administered
9 for a period of roughly a year. And, so, we're going to need
10 some ability to be able to keep our debtor, our client,
11 operational, keep the lights on, pay employees, and be able to
12 effectuate a sale.

13 And I did approve on that basis under 364 of the
14 Bankruptcy Code that based upon the evidence that was provided
15 to the Court, and that there was no other way in which the
16 debtor could obtain any kind of post-petition financing, that
17 the best way to go was to apply for a PPP loan. And -- or --
18 and I approved that. And I was careful to point out -- and
19 Mr. Keiffer pushed me on this -- that I didn't see anything at
20 that time under the first tranche and under the application
21 that precluded the debtor from applying. But I also said that
22 I'm not going to (indisc.; audio glitch) my discretion to
23 dictate how the SBA administrator administers the acceptance
24 or rejection of these loans. And, so, I made that abundantly
25 clear.

1 So, Ms. Wexler, based upon her affidavit, applied,
2 and it's unequivocally clear, as I indicated, that she was
3 denied based upon the fact that the debtor is in bankruptcy.
4 At the time that the first application was filed, there was not
5 any rule in effect that specifically dealt with -- and when I
6 talk about rule, I'm talking about a regulation -- that
7 specifically dealt with this quandary of there are no
8 implementing regs that said that a debtor could be precluded
9 from participating in the program, other than what was listed
10 on the application. And, so, the debtor, obviously, argued at
11 that point in time: Gee, we don't understand why we're being
12 excluded. We don't understand -- that there is no implementing
13 regulation that suggests to the administrator that she can do
14 this.

15 The application was filed. Mr. Keiffer has impressed
16 me repeatedly throughout this case with his forthrightness and
17 his ability to react, if you will, to changes in the law. He
18 amended the application to point out that, as it relates to the
19 second tranche of the funding under the CARES Act, that the SBA
20 implemented a rule without notice and comment, which they had
21 to do under the context of this situation, that now precluded
22 debtors in bankruptcy from participating in this loan program.
23 And, so, obviously, it is -- you could use the language, is it
24 discriminatory as it relates to debtors in bankruptcies.

25 Importantly, as Ms. Sinesi points out, the CARES Act

1 is still under the confines of section 7(a). And, as a
2 result -- and also under 636. And, so, there are -- it does
3 give the administrator, in my judgment, under those statutory
4 provisions, the ability to implement regulations to
5 implement -- or, rather promulgate regulations to implement the
6 PPP program. The administrator, in her discretion, decided
7 that these type of loans should not be awarded to debtors,
8 which I think is, obviously, an incredibly harsh result. It's
9 not a result I personally like, but that's the -- that's the
10 discretion that's been delegated to the administrator by
11 Congress. And for this Court to step in and say, well, no,
12 that's not what Congress should have done, or this is what
13 Congress should have done, I don't view that's my role,
14 particularly as an Article I judge. Congress, it seems to me,
15 delegated this authority under very difficult times to the
16 administrator. It did, in my judgment, notwithstanding the
17 very cogent arguments that have been advanced by the debtor,
18 somehow preclude the administrator's authority or discretion to
19 implement regulations that restrict it to debtors.

20 So, let's move on to 525(a). The debtor makes a
21 strong argument that this is discriminatory. But if you look
22 at the operative language under 525(a) of the code, it does not
23 apply to loans. And notwithstanding what the debtor has argued
24 this morning, that this is effectively a grant, it's not a
25 grant. It's a loan as defined under the applicable SBA

1 statutes and regulations. So, while it might arguably be
2 discriminatory because it's a governmental action, I don't
3 think it meets under the statute the qualifying language.
4 There is nothing in there that the statute speaks to about a
5 loan, and as was addressed in a number of filings with this
6 Court, when Congress amended this 525(a), it did make an
7 allowance for student loans, but certainly not for loans of
8 this type of nature. Moreover, I think the case law that's
9 been provided to the Court by the SBA, I think is more
10 compelling than the arguments that have been advanced by the
11 debtor as to whether or not this is a violation of 525(a).

12 I'll also note, for the record, that there is Fifth
13 Circuit precedent that indicates to this Court that this Court
14 should narrowly apply 525(a). And, as a result, I think I'm
15 constricted or confined by the court, by the Fifth Circuit, in
16 terms of how I construe the statute.

17 So, now let's talk about the elements under a TRO.
18 So, I've got the evidence -- there is no doubt in my mind that
19 there could be a horrible, horrible effect on the debtor if I
20 don't allow the debtor to go forward and be eligible or apply
21 for these loans. But the question is, should I do that. So,
22 before I address whether or not the debtor has met its
23 burden -- and it is on the debtor to meet their burden on the
24 TRO -- let me circle back to where we started.

25 Now, I was being somewhat flippant, but also being

1 somewhat serious. I clearly recognize that I'm an Article I
2 Court of limited jurisdiction. And in reviewing the initial
3 application and then the amended application for a TRO, several
4 things stood out that my learned colleague, Judge Jones, also
5 focused on. This has to be limited in application. I can't --
6 I don't have the authority, as an Article I judge in San
7 Antonio, Texas, to dictate how the administrator administers
8 its loan process across the United States or nor can I
9 necessarily dictate to banks how they effectuate or consider
10 these types of loans. It's really a function of what the
11 administrator tells the banks to do. So, to the extent I would
12 even grant a TRO today, it would be limited by the realization
13 that my authority is limited, at best, and could only apply to
14 the debtor here.

15 So, what has the debtor asked the Court to do? The
16 debtor has asked the Court to do two things. Number one, the
17 debtor has asked the Court to essentially strike the language
18 on the PPP application and instruct the banks and the SBA to
19 disregard that language and to process the loans. As I have
20 indicated earlier, I don't think I can do that under the
21 statute that governs the SBA and the applicable law.

22 The second thing is that the debtor has asked -- and
23 I don't blame the debtor for asking me to do this -- is to
24 instruct the SBA to allocate or put aside \$700,000 that the
25 debtor believes it would be otherwise entitled to money if it

1 was properly considered for a loan. I don't think I have the
2 authority to do that either.

3 Finally, the debtor asked -- and, again, I understand
4 perfectly why the debtor would ask for this type of relief --
5 has asked me to require -- that I instruct the SBA, to the
6 extent I was going to grant this TRO, to put the debtor -- to
7 use the parlance that was indicated in the application -- back
8 into the queue. I can't do that either. I don't think I have
9 the authority to do that. At best, if I were going to grant
10 the TRO, the most relief I could give is sort of what Judge
11 Jones -- the relief he gave in his case, which is to strike the
12 language and instruct the SBA to consider the loan on its terms
13 at the time it's being submitted. But for the reasons that I
14 have indicated today, I am not going to grant the TRO, with due
15 recognition of my learned colleague, and I'll explain why in
16 just a minute.

17 Number one, I don't think, as a matter of law, I can
18 grant the -- I don't think there is a likelihood of success on
19 the merits, for the reasons that I have explained. I don't
20 think under the statutory scheme that's been promulgated, and
21 notwithstanding these -- the expedient nature of things, that I
22 have the requisite authority to grant this relief. I think I'm
23 constrained by Fifth Circuit law in the statute. Furthermore,
24 I don't think I can enjoin the administrator, as I've
25 indicated; and, furthermore, I don't think I can substitute my

1 judgment -- it wouldn't be my judgment -- for her discretion in
2 how she administers the PP loans. I just simply don't think I
3 have the authority to do that.

4 Second, I question whether or not I have the
5 authority under a related-to scenario to enjoin the
6 administrator. I think probably that's more in the context of
7 an Article III judge, but, for purposes of the record, even
8 finding under related-to jurisdiction that I have the ability
9 to make this determination, I don't think it's warranted in
10 this circumstance. I don't think, based upon the discretion
11 that's afforded the administrator under this context, that,
12 while it's going to operate as a severe burden on this debtor
13 and other debtors, I can make the requisite finding that it's
14 arbitrary and capricious for the reasons I have explained. So,
15 on that basis alone, I don't think that I can approve the TRO,
16 because I don't think the debtor has met its burden.

17 Finally, as to irreparable injury, sure, this will
18 have a dramatic effect on the debtor. And if the debtor
19 doesn't get this loan, there is a real possibility that this
20 debtor may not be able to proceed in Chapter 11. So, I
21 recognize that there could be irreparable injury to the debtor
22 in this context.

23 And, then, finally, as to the public aspect of this,
24 I don't know, necessarily -- there are two ways to look at
25 this. The administrator has the responsibility to administer

1 the PP -- the CARES Act as she thinks is appropriate. It will
2 adversely affect debtors; I recognize that, but I have to,
3 again, in these difficult times, acknowledge that the
4 administrator does have the overall arching authority to do
5 this in consultation with the treasury secretary. And she has
6 implemented these programs. While there is an adverse effect
7 on this debtor, my concern is, is that I -- were I to adopt the
8 debtor's position, as was indicated by Ms. Sinesi at the
9 beginning of her presentation to the Court, I think it would
10 have a negative effect on the administrator's ability to
11 administer the PPP program.

12 So, notwithstanding what Judge Jones said in his
13 case, I think it's factually different than this case, inasmuch
14 as now we have the implementing regulation, and the debtor in
15 that case was providing emergency ambulatory services. While
16 this debtor has an important business, it's not of a critical
17 nature. I simply don't think I, for the reasons I've stated on
18 the record, that I can approve the granting of the TRO. I
19 would add, reluctantly, it doesn't make me happy to do this,
20 because I have a great deal of sympathy for the position that
21 the debtor is in, but based upon the law and the statutes, I am
22 constrained to apply them as best I can. So, for the reasons
23 I've stated on the record, the TRO is denied.

24 So, Ms. Sinesi, you can prepare an order that simply
25 recites that the TRO is denied, and we'll proceed forward in

1 this case prospectively, but I'm not going to grant the TRO.

2 As for purposes of the show cause, I'm going to find
3 that the administrator through her counsel has appeared and has
4 provided cause, so they've made the requisite appearance and
5 made the requisite arguments. I don't think I need to make any
6 other determinations, other than the administrator for the SBA,
7 through its counsel of record, has made the appropriate
8 appearance and made the appropriate argument. So, there is no
9 other -- show causes has been -- on that matter has been shown.

10 Ms. Sinesi, any else from your perspective?

11 **MS. SINESI:** No, your Honor. Thank you.

12 **THE COURT:** Mr. Keiffer?

13 **MR. KEIFFER:** Reluctantly, no.

14 **THE COURT:** All right. I know it's very
15 disappointing to you, Mr. Keiffer. As I indicated previously,
16 sometimes I make decisions that I'm not particularly happy
17 about. This is clearly one of them. But I think I'm
18 constrained by the law.

19 So, let me thank you all for some very good argument,
20 some very good briefing. I've done the best I can do under the
21 circumstances. I realize that I am in disagreement with
22 probably a number of jurists on this, but I have applied the
23 law and the facts as best I can under the circumstances.

24 So, the parties in *Asteria* are excused. You may step
25 off the line.

(Proceeding was adjourned at 11:58 a.m.)

CERTIFICATION

DISCLAIMER:

The integrity of this transcript may be adversely affected due to unclear telephonic transmission of Mr. Keiffer's argument.

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



May 9, 2020

Signed

Dated

TONI HUDSON, TRANSCRIBER